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The Historic Home of the Presidents of the United States

THE WOMAN CITIZEN'S LIBRARY

A Systematic Course of Reading in Preparation for the Larger Citizenship

Editor

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VOLUME III

Political Science

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EDITOR'S NOTE

The purpose of THE WOMAN CITIZEN'S LIBRARY is to fit women for the Larger Citizenship and naturally such preparation should begin with the study of Political Science. This Course by Dr. Macy, is undoubtedly the best popular presentation of the fundamental principles of the "Science of State" ever published and should be read carefully.

Following this department will come the departments of "Practical Politics," "Woman Suffrage," "Woman and the Law," "Woman and the Larger Citizenship," etc., all arranged in their logical order. (See list of subjects and contributors for full outline.)

Particular attention is called to the practical and convenient arrangement of the text. Information on important subjects is supplemented by quotations from other authorities. All such quotations are given in full thus doing away with the necessity for extensive research. (Copr., MDCCCXCVIII., by T. U. A.)

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PART IX

The Relation of Law to Democracy

CHAPTER I

DESPOTISM OPPOSED TO LAW

"THE law is a school master." No sort of training is more intimately related to the building of the State than that which is incident to the making and enforcement of law. The despotism of the anti-State is characterized by the absence of law. Says Sir Frederick Pollock: "If we suppose an eastern despot to sit in the gate and deal with every case according to the impression of the moment, recognizing no rule at all, we may say that he is doing some sort of justice, but we cannot say that he is doing judgment according to law."[1] In so far as a ruler follows his own will in the exercise of authority and in the administration of justice, he is ruling not according to law. His acts may be good or bad; they are not lawful. In so far as a ruler has respect unto the rules of right conduct which prevail in the State, so far as he seeks to embody and express the will of the State, or so far as he honestly seeks to express and carry into effect rules derived from any source other than his own will, so far the government becomes, or tends to become, one of law.

(1) In the Russian Empire there have grown up systems of decrees and orders issued by the Czar through his various councils, which receive the name of laws. But Mr. Wallace, in his description of the Russian government, notes the fact that executive orders issued by administrative officers were of higher authority than the so-called laws. The executive orders which serve to annul the laws are not themselves laws. A real autocrat cannot make laws and he cannot be controlled by laws. In so far as the Roman emperors recognized and administered laws they were not autocrats; they were limited monarchs. They ruled according to wills other than their own. To quote again from Sir F. Pollock: "Probably no prince or ruler in historic times ever really took upon himself to do right according to his mere will and pleasure." Even in Russia there are, of course, especially since the establishment of the Duma and a limited constitutionalism, laws which no Czar would ever dare to set aside by arbitrary decree. Russia, therefore, lacks so much of being an autocracy. Government according to the arbitrary will of a monarch or a limited class is no longer possible. There must be more or less reference to the will of the people. Every effort to govern despotically tends directly to destroy the State. The ancient Persian kings had clearly the idea of law as distinct from arbitrary decree, because when a decree was put forth after the manner of the laws of the Medes and Persians it could not be changed. The Asiatic States did have some of the ele-

ments of true States. But autocracy and tyranny prevailed over law and they came to naught, so that Western students are led to assert that Asia, unaffected by Western ideals, has produced no State.

(2) The commands of a master delivered to slaves are not law, and they never can be made into law. Neither are commands which generals give to soldiers. The rules which parents lay down for the guidance of children are not laws. Yet all these experiences have had much to do in giving rise to the sense of law and the fact of law. When slaves became numerous and masters and slaves entered into mutual coöperative arrangements for tilling the soil and distributing the produce, rules grew up binding alike upon master and serf. These rules came to be recognized, and administered as a part of the law of the land. So also when general and soldiers adopt rules of action governing their mutual relations, these have a much closer resemblance to law than the mere orders of the general. When grown up children come to be treated as equals, and families and kinsfolk adopt orderly methods of living together, and fall into the habit of recognizing rules and customs as binding upon the entire community, we have an illustration of primitive law. It may well be admitted that slavery, the war-club, parental despotism, and all manner of tyrannies and despotisms, have, historically, had a share in developing the sense of law.

(3) Ants and bees may be living together in an

orderly society, yet only by a figure of speech can we call their rules of conduct, laws. During certain stages of human development we find men living much in the same way. They are governed by a sort of tribal instinct. They are victims of habits and customs over which they have no control. The various castes in the Orient are victims of custom and habit, and such a state of society renders the legal spirit impossible. Law implies freedom of choice. It assumes a sense of moral obligation on the part of the members of the society. Among Western peoples the very word or words which in later times are used to express the idea of law, in their origin meant a thing that was recognized as fitting or orderly, while later the same word is applied to that which one may claim as fit or as his right. Thus law in its origin is associated with liberty. It expresses the moral sense of a free and self-choosing society. Tyranny and brutality may indirectly tend to develop a sense of law, in that by these means men may be shaken out of a condition of subjection to blind, unreasoning instinct or superstition. Again, these blind, unreasoning instincts and superstitions may indirectly tend to develop a sense of law, in that they may enable men to more effectively resist the dehumanizing tendencies of tyranny.[2] Thus it may well be that the action and reaction of tyrant upon tribal custom and of custom upon the conduct of the lord, may have had no small share in the development of a sense of law. But the law itself comes neither from the blind customs of the

tribe nor from the commands of the tyrant; it does come from the conscious will of a free and self-acting community. Thus law and liberty are obverse sides of the same institution. *Law may be defined as the rules of conduct whereby a free and self conscious society maintains its existence and guards the rights of its members.*[a]

SUPPLEMENTARY READING

CHAPTER I

Despotism Opposed to Law

[1] **Science of Law.**—"Another point worth mention is that the law does not include of necessity the existence of a distinct profession of lawyers, whether as judges or as advocates. There cannot well be a science of law without such a profession; but justice can be administered according to settled rules by persons taken from the general body of citizens for the occasion, or, in a small community, even by the whole body of qualified citizens; and under the most advanced legal systems a man may generally conduct his own cause in person, if so minded. In Athens, at the time of Pericles, and even of Demosthenes, there was a great deal of law, but no class of persons answering to our judges or counselors. The Attic orator was not a lawyer in the modern sense. Again, the Icelandic sagas exhibit a state of society provided with law quite definite as far as it goes, and even minutely technical on some points, and yet without any professed lawyers. The law is administered by general assemblies of freemen, though the court which is to try a particular cause is selected by elaborate rules. There are old men who have the reputation of being learned in the law; sometimes the opinion of such a man is accepted as conclusive, but they hold no definite office or official qualifications. In England, as we shall see hereafter, there was no definite legal profession till more than a century after the Norman conquest. In short, the presence of law is marked by the administration of justice in some regular course of time, place, and manner, and on the footing of some recognized general principle. These conditions appear to be sufficient, as they are necessary. But if we suppose an Eastern despot to sit in the gate and deal with every case according to

the impression of the moment, recognizing no rule at all, we may say that he is doing some sort of justice, but we cannot say that he is doing judgment according to law. Probably no prince or ruler in historical times ever really took it upon himself to do right according to his mere will and pleasure. There are always points of accepted faith which even the strongest despots dare not offend, points of custom which he dare not disregard."—*"History of English Law," by Pollock and Maitland, Vol. I, p. 27.*

[2] **The Antiquity of Despotism.**—We are apt to regard despotism as a lower form of development in comparison with the constitutional State, and attribute to it accordingly a high antiquity. It used formerly to be thought that beginnings of political life might be seen shaping themselves in the forms of it. But this is contradicted at the very outset by the fact that despotism stands in opposition to the tribal or patriarchal origin from which these States have grown. The family stock has, of course, a leader, usually the eldest; but, apart from warfare, his power is almost nil, and to overestimate it is one of the most frequent sources of political mistakes made by white men. The chief's nearest relations in point of fact do not stand far enough below him to be mingled indiscriminately in the mass of the population over which he rules. Thus we find them already striving to give a more oligarchical character to the government. The so-called court of African or ancient American princes is doubtless the council which surrounds them on public occasions. Arbitrary rule, though we find no doubt traces of it everywhere in the lower grades, even when the form of government is republican, has its basis not in the strength of the State or the chief, but in the moral weakness of the individual, who submits almost without resistance to the domineering power. In spite of individual tyranny there is a vein of democracy running through all the political institutions of the "natural" races. Nor could it well be otherwise in a society which was built up upon the gens, kindred in blood, communistic, under the system of "mother-right." But herein lay no doubt an obstacle to progress.—*"History of Mankind," by Ratsel, pp. 131-132.*

"**Definition of Law.**—"I have now completed my statement of what appears to me the essentials in a *State*, or political society, as ordinarily apprehended, and in the *law* of such a State in the same popular sense. In criticising the definitions of my predecessors, I have not forgotten their difficulties, which I cannot hope to have myself surmounted. Each successive definer of law, municipal or otherwise, must anticipate the addition of one more failure to those which have gone before. I can only say of the following that it is in accordance with my previous positions, and that they appear to me based upon facts:

"*The law of a State is the aggregate of rules administered mediately or immediately by the State's supreme authority, or regulating the constitution and functions of that supreme authority itself; the ultimate sanction being, in both cases, disapproved by the bulk of the members of the State.*"—"*Practical Jurisprudence*," by E. C. Clark, p. 172.

Homes of the Mighty

THE WINTER PALACE, SAINT PETERSBURG, RUSSIA

CHAPTER II

THE ORIGIN OF MAGNA CHARTA

WHEN first we become acquainted with our heathen ancestors we find them living in village communities, and with a rude system of law already well developed. They were living under rules and customs to which they were greatly attached. Later our English ancestors became Christians and a parish priest was added to the village, while as Christians they learned many new rules of conduct. At the same time the village farmers were subject to action and reaction in relation to a chief person, or lord, who at one time was disposed to command them as a captain commands his troop, and at another time was disposed to coöperate with them on the basis of rules which all recognized as just and right. As wealth increased there grew up a hierarchy of lords who were disposed to play the tyrant, and a hierarchy of priests and clergy who disputed the authority of the lords. In the meantime kings arose.[1] Throughout the whole of English history wise kings have strengthened their position by looking to the lower ranks of the people as a means of protection against lords and bishops. It was through the patronage of kings more than from any other one

source that the primitive laws and liberties of the English people were preserved and developed.

(1) When William of Normandy, 1066,[2] came into the country with his horde of foreign conquerors one might have supposed that English freedom was at an end. On the contrary William gave to English law and custom, as preserved in towns, hundreds,[3] and counties, a new lease of life. He knew what the feudal system was as developed in France, and with the eye of a statesmen he discerned that his most secure bulwark against his dangerous feudal barons was found in the local liberties and customs of the English people. He made friends with the English by preserving their local courts and strengthening them by royal patronage. English law and liberty were thus preserved against feudal lawlessness.

(2) During the hundred years following the Norman Conquest there arose two other kings who, in a sense, perfected the system of the Conqueror. Judges from the King's Council visited the local courts and administered and enlarged the English law. The people were furnished effective protection against local tyrants. At the hand of the king's justices the law was made uniform and national. The closest possible relations were established between the king's government and the local governments in county and town. When barons rebelled, the people, of their own accord, arose and crushed out rebellion. By the end of the reign of Henry II., who died in 1189, so strong was the king's

government and so threatening was the attitude of king and people towards the barons, that the barons themselves began seriously to study the art of winning the favor of the English people.

Circumstances favored the new school of political science. Richard I., who followed Henry, was a tyrant, and John, who followed him, was, by common consent, one of the worst kings who ever lived. John impressed all classes as being a thoroughly dangerous ruler. All classes finally united against him. The barons, it is believed with a good degree of sincerity, drew the sword against an English king on behalf of English liberties. The clergy, with the Archbishop at their head, were thoroughly united in support of the barons. The people were for the time thoroughly convinced that their interests lay also with the barons. The king left without support, was threatened with an invasion by his inveterate enemy, the King of France. The result was the meeting at Runnymede at which John was forced to sign Magna Charta.

(3) The Great Charter is a solemn covenant agreed to and ratified by different classes of the people pledging all parties to see to it that all their good laws and liberties should be guarded and preserved. It is a recognition of the supremacy of law as against arbitrary commands. The issuing of the Charter is to be viewed as one of a series of events all of which tended to enforce one lesson: that is, that kings and rulers are subject to the law.[4] When Henry I. a hundred years

earlier had issued a charter upon which the Great Charter was based, it was a confession that the previous king had been a violator of law, and it was a guaranty that such abuses should cease. After the reign of King John there was always a party in England ready to appeal to the people for support against the despotic acts of kings. Future kings were compelled or induced to ratify the Charter. It thus became a sort of political platform to which the liberty-loving appealed for support.

It should be borne in mind, however, that the Charter was not so much a body of laws observed and strictly enforced as it was an expression in favor of the good laws and customs of the past, and in favor of the rule of law as against despotism. After the adoption of the Charter the barons were disposed to become as tyrannical as ever, and other kings arose who won back the support of the people. After the Charter, as before the Charter, the legal and substantial liberties of the people came from wise kings who looked to the people for support against their powerful subjects.

But after the Charter there was also a class of powerful subjects who were also accustomed to appeal to the people for support against the king. In this contest the king was always in the position of advantage. Through his system of courts, through the army, and especially through the local militia trained by the king's officers, the monarch could at all times give substantial protection to his subjects. The barons, on the other

hand, could restrain the king only by revolution or by threatened revolution. Thus, in appearance, English liberty grew by the union of powerful subjects with sections of the common people for the purpose of forcing or inducing the king to extend and enlarge the popular privileges. Yet the more important fact is that kings all the while found it to their advantage to enlarge and extend the local privileges of the people in order to weaken their most dangerous subjects. In all cases, whether by barons or by kings, the appeal to the people was made in the name of law. There were thus centuries of training whereby the people were taught to identify law and privilege and liberty. The law was made a perpetual bulwark against the brutality of lords and against the tyranny of kings. By those centuries of training the Anglo-Saxon race was fitted for democracy.

SUPPLEMENTARY READING

CHAPTER II

The Origin of Magna Charta

[1] **The Rise of Kings.**—Now in our Old English Chronicles, when they tell how the first English conquerors, Hengest and Horsa, settled in Kent, they do not call them *Cyningas* but *Heretogan,* Leaders or Dukes. It is not till after some victories over the Britons that we hear that Hengest took the *rice* or kingdom, and that his son Æsc is called *King.* So in Wessex, the first conquerors Cedric and Cynric are called *Ealdormen* when they land; but, when they have established a settled dominion at the expense of the Welsh, we read that they too took the *rice,* and the leaders of the West-Saxons are henceforth spoken of as Kings.

It is plain then that the first leaders of the English settlements in Britain, when they came over, bore only the lowlier title of *Heretoga* or *Ealdorman;* it was only when they had fought battles and found themselves at the head of a powerful and victorious settlement on the conquered soil that they were thought worthy of the higher title of Kings. And we may further believe that, with all their exploits, they would not have been thought worthy of it, if they had not been held to come of the blood of the Gods, of the divine stock of Woden.

We thus see that kingship, in the strict sense of the word, as distinguished from the government of Dukes or Ealdormen, had its beginning among the English in Britain, not in the very first moment of the Conquest, but in the years which immediately followed it, within the lifetime of the first generation of conquerors.

The same distinction which we find among the Angles and Saxons we find also among the kindred nations of Scandinavia.

When the Danes and Northmen began those invasions which led to such important settlements in northern and eastern England, we always find two marked classes of leaders, the Kings and the *Jarls*, the same word as *Eorl*. Of these the *Jarls* answer to the English *Ealdormen*. The distinction is again clearly marked, when we read that the Anglo-Saxons, the Saxons of the mainland, were ruled, not by Kings, but by what our Latin writer is pleased to call *Satraps* — that is, of course, *Dukes* or *Ealdormen*.—*"The Growth of the English Constitution," by Edward A. Freeman, pp. 57-59.*

[2] **William of Normandy.**—"William the Conqueror" was the natural son of Robert, duke of Normandy. He succeeded to the duchy on the death of his father, in 1035.

With the assistance of his suzerain, Henry, King of France, he put down a formidable rising of his vassals in a battle near Caen in 1074. He visited in 1051 his childless kinsman, Edward the Confessor, from whom he afterward claimed to have received a promise of the succession to the English throne. In 1052 he married Matilda of Flanders.

William obtained a bull from Pope Alexander II., which declared him to be the rightful heir to the throne; landed at Pevensey, September 28, overthrew Harold at the battle of Hastings, October 14, and was crowned at Westminster, December 25, 1066.

[3] **Hundred.** — A division of a county in England, supposed to have originally contained one hundred freemen or families.

[4] **The Great Charter.** — There are indeed certain great political documents, each of which forms a landmark in our political history. There is the Great Charter, the Petition of Right, the Bill of Rights. But not one of these gave itself out as the enactment of anything new. All claimed to set forth, with new strength, it might be, and with new clearness, those rights of Englishmen which were already old. In all our great political struggles the voice of Englishmen has never called for the assertion of new principles, for the enactment of new laws; the cry has always been for the better observance of the laws which were already in force, for the redress of grievances which had

arisen from their corruption or neglect. Till the Great Charter was wrung from John, men called for the laws of good Edward. And when the tyrant had unwillingly set his seal to that groundwork of all our later law, men called for the stricter observance of a Charter which was deemed to be itself only the laws of Edward in a newer dress. We have made changes from time to time; but they have been changes which have been at once conservative and progressive — conservative because progressive, progressive because conservative.

They have been the application of ancient principles to new circumstances; they have been the careful repairs of an ancient building, not the pulling down of an old building and the rearing up of a new. The life and soul of English law has ever been precedent; we have always held that what our fathers once did, their sons have a right to do again. When the Estates of the Realm declared the throne of James the Second to be vacant, they did not seek to justify the act by any theories of the right of resistance, or by any doctrines of the rights of man. It was enough that, three hundred years before, the Estates of the Realm had declared the throne of Richard the Second to be vacant.

By thus walking in the old paths, by thus hearkening to the wisdom of our forefathers, we have been able to change whenever change has been needed, and we have been kept back from changing out of the mere love of abstract theory. We have thus been able to advance, if somewhat slowly, yet the more surely; and when we have made a false step, we have been able to retrace it. On this last power, the power of undoing whatever has been done amiss, I wish specially to insist. In tracing the steps by which our Constitution has grown into its present shape, I shall try specially to show in how many cases the best acts of modern legislation have been, wittingly or unwittingly, a falling back on the principles of our earliest times.—*"The Growth of the English Constitution," by Edward A. Freeman, pp. 84-86.*

CHAPTER III

THE NOBILITY AND KINGS MADE SUBJECT TO LAW

FROM the signing of the Great Charter, 1215, to the first Tudor king, 1485,[1] there were perpetual conflicts between kings and factions of the barons, or between kings and leading nobles, who, in the later period, bore the titles of dukes and earls. During all this time the lower classes of the people were being trained under law. The historian, Creasey, estimates that at the time of the signing of the Charter half of the people were slaves. That is, half the people were bound to the soil as serfs or were chattel slaves. At the hands of common law courts or at the hands of kings and the high court of Parliament, slavery had practically disappeared by the end of the Wars of the Roses. Before the Great Charter, Henry II. had been the great organizer of the common law courts. At the end of the century of the Charter, Edward I. perfected the work of the permanent organization of the judiciary. The direct object of these kings in the organization of these courts was to gain the support of the lower classes of the people against the attacks of the barons. The people granted money to their sovereign and served him as soldiers in return for protection against local tyrants

among the nobility and gentry. Through the courts of law judicial process was substituted for violence and brute force. Through the training of the courts the middle and lower classes became orderly and law-abiding, centuries before the higher nobility were brought under subjection to law. Down to the period of the Wars of the Roses the great lords continued lawless and violent. Judicial processes went without resistance among the middle and lower classes, but when a duke or an earl was involved mob violence often ensued, witnesses were assassinated, jurors were murdered, courts were broken up by hired mobs or armed retainers.

The whole history of feudalism and the age of chivalry which sprang up upon the decline of feudalism was characterized by violence and brutality on the part of the ruling classes. In England, as feudal dues gave place to money payment and free contract, the surplus revenue of the great lord was used to maintain a standing army of liveried men who followed the train of the dignitary and were everywhere a menace to good order and the peace of society. In the Wars of the Roses these enemies of law destroyed each other on the bloody field, and parliaments extended the work of destruction by summary confiscations and bills of attainder.

(2) Henry VII. came to the throne with the old nobility much weakened by the civil wars. The lower clergy, the lower nobility, the commercial classes, and all the lower classes in the State had long been law-abiding and orderly. Henry determined to complete

the work of the Wars of the Roses by bringing all his great subjects under the reign of law. He looked to the clergy, the squirarchy, and the people for support while he proceeded to execute the laws against dukes and earls. There had long been laws against armed retainers and liveries, but they had remained a dead letter. With relentless vigor the king stripped from the nobility this source of lawless power. The nobility had always escaped their just share of the taxes.

Henry taxed them without mercy, and no doubt unjustly. The common law courts having long been accustomed to show undue deference to a lord, Henry set up the Star Chamber, an arbitrary court which in his hands was a powerful means for the training of the nobility in the new rôle of orderly and law abiding conduct.[2] England, says Gardiner, needed a constable, and Henry VII. gave what was needed.

(3) During the long reign of Henry VIII., the nobility continued to be trained to habits of obedience to law, and were permanently added to the law-abiding classes. During this reign also there was a revolution in the Church. Throughout the entire history the lower clergy had, for the most part, sided with the people in all their struggles for liberty. The higher clergy had almost as uniformly sided with the party of reaction and privilege. The Church had accumulated great wealth, which was in the hands of the few, who were, as a class, timid, and many were corrupt and tyrannical.

The doctrines of the Reformation had taken deep

hold in England, and the policy of the government during the latter part of the reign of Henry VIII. and the reign of Edward VI. resulted in the confiscation of a large part of the property of the Church and in destroying the authority of the pope, so that the higher clergy as well as the lower found themselves subject to the ordinary laws of England without any chance of appeal to a foreign potentate. The long reign of Elizabeth completed the work of making the English nation Protestant.

Thus at the hands of Tudor monarchs all classes of Englishmen had become wonted to submission to the authority of one supreme law. It is the great glory of the Tudors that they substituted the forms of law for violence and force. They were arbitrary and tyrannical, but, for the most part, they used their arbitrary powers to destroy or subdue the lawless classes. At the end of the Tudor rule there was a united England prepared to grapple with the last obstacle to the triumph of law over despotism.

(4) When all but the monarch have been made law-abiding, and have been trained to habits of obedience to law, the question, Shall the monarch also submit to law? becomes a momentous one.

In England this was an old question. John not only promised to himself obey the provisions of Magna Charta, but he appointed twenty-five barons whose duty it was to make war upon him and compel him to obey. Throughout the reign of Elizabeth there was a growing

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party in the House of Commons who were accustomed to assume that it was the Queen's duty to observe the laws. On many occasions Elizabeth was induced to modify her policy out of regard to this party.

The Tudor monarchs were followed by foreign kings from Scotland, who boldly challenged the law-abiding English nation with the proposition that kings are not subject to the law, that they rule by divine right, that to all subjects of every class belonged the simple duty of obedience. The trained party in the House of Commons was not slow to accept this challenge. Over this issue there was relentless conflict for a hundred years. As incidents in the conflict, one king was executed according to forms of law, and another was by law dethroned. Parliament assumed and exercised the authority of deciding who should be king. As a result of this conflict the conclusion was at least reached that the monarchs were subject to the decrees of Parliament.

The doctrine had also been definitely set forth that the final source of all law was not the king, nor Parliament, but the Nation at large. For more than two centuries this idea has gathered strength, until now it is an accepted axiom of the English Constitution. The Crown, Parliament, the Courts of Law are all subordinate agencies of the enfranchised nation, and all are subject to law.[3] Thus the law has been a schoolmaster leading to democracy.

SUPPLEMENTARY READING

CHAPTER III

The Nobility and Kings Made Subject to Law

[1] **First Tudor King.**—Still young, for he was hardly thirty when his victory at Bosworth placed him on the throne, the temper of Henry the Seventh seemed to promise the reign of a poetic dreamer rather than of a statesman. The spare form, the sallow face, the quick eye, lit now and then with a fire that told of his Celtic blood, the shy, solitary humor which was only broken by outbursts of pleasant converse or genial sarcasm, told of an inner concentration and enthusiasm; and to the last Henry's mind remained imaginative and adventurous. He dreamed of crusades, he dwelt with delight on the legends of Arthur which Caxton gave to the world in the year of his accession. His tastes were literary and artistic. He called foreign scholars to his court to serve as secretaries and historiographers; he trained his children in the highest culture of their day; he was a patron of the new printing press, a lover of books, and of art. The chapel at Westminster which bears his name reflects his passion for architecture. But life gave Henry little leisure for dreams or culture. From the first he had to struggle for sheer life against the dangers that beset him. A battle and treason had given him the throne; treason and a battle might dash him from it. His claim of blood was an uncertain and disputable one even by men of his own party. He stood attainted by solemn Act of Parliament; and though the judges ruled that the possession of the crown cleared all attaint, the stigma and peril remained. His victory had been a surprise; he could not trust the nobles; of fifty-two peers he dared to summon only a part to the Parliament which assembled after his coronation and gave its recognition to his claim of the crown. —*"History of the English People," by John Richard Green, pp. 67, 68.*

[2] **Henry VII. as a Constable.**—The improvement in the general well-being of the country had been rendered possible by the extension of the royal power, and the price paid for order was the falling into abeyance of the constitutional authority of Parliament. The loss indeed was greater in appearance than in reality. In the fifteenth century the election of members of the House of Commons depended more upon the will of the great lords than upon the political sentiment of the community. In the first half of the sixteenth century they depended on the will of the king. The peculiarity of the Tudor rule was that its growing despotism was exercised without the support of the army. It rested on the good will of the middle classes. Treading carefully in the steps of Edward IV., Henry VI. recognized that in order to have a full treasury it was less dangerous to exact payment illegally from the few, than to exact them legally from the many. Hence his recourse in time of trouble to benevolences. Hence, too, the eagerness with which he gathered in fines. The Cornish rebels were fined individually. The great lords who persisted in keeping retainers were fined. On one occasion the king visited the Earl of Oxford and found, when he went away, a band of retainers drawn up to do him honor. "My lord," he said, "I thank you for your entertainment, but my attorney must speak with you." If there was a man in England who had deserved well of Henry it was Oxford, but Oxford had to pay £15,000 ($75,000), a sum worth perhaps £180,000 ($900,000) at the present day, to atone for his offense. No services rendered to Henry were to excuse from obedience to the law. . . . In 1509, before any of these plans could have taken effect, Henry VII. died. He deserves to be reckoned amongst the kings who have accomplished much for England. If he was not chivalrous or imaginative, neither was the age in which he lived. His contemporaries needed a chief constable to keep order, and he gave them what they needed.—*"Gardiner's Student History," Vol. I, pp. 356-358.*

[3] **Doctrines of King James.**—Even before his accession to the English throne, he had formulated his theory of rule in a work on "The True Law of Free Monarchy"; and announced

that, "although a good King will frame his actions to be according to law, yet he is not bound thereto, but of his own will and for example-giving to his subjects." With the Tudor statesmen who used the phrase, "an absolute King" or "an absolute monarchy" meant a sovereign or rule complete in themselves, and independent of all foreign or Papal interference. James chose to regard the words as implying the monarch's freedom from all control by law, or from responsibility to anything but his own royal will. The King's theory, however, was made a system of government; it was soon, as the Divine Right of Kings, to become a doctrine which bishops preached from the pulpit, and for which brave men laid their heads on the block. The Church was quick to adopt its sovereign's discovery. * * *

Cowell, a civilian, followed up the discoveries of Convocation by an announcement that "the King is above the law by his absolute power," and that "notwithstanding his oath he may alter and suspend any particular law that seemeth hurtful to the public estate." The book was suppressed on the remonstrance of the House of Commons, but the party of passive obedience grew fast. A few years before the death of James, the University of Oxford decreed solemnly that "it was in no case lawful for subjects to make use of force against their princes, or to appear offensively or defensively in the field against them." The King's "arrogant speeches," if they roused resentment in the Parliaments to which they were addressed, created by sheer force of repetition a certain belief in the arbitrary power they challenged for the Crown. We may give one instance of their tone from a speech delivered in the Star-Chamber. "As it is atheism and blasphemy to dispute what God can do," said James, "so it is a presumption and a high contempt in a subject to dispute what a King can do, or to say that a King cannot do this or that."—*"Short History of the English People," by J. R. Green, p. 478.*

CHAPTER IV

THE TWO THEORIES OF LAW

IN the previous lessons we have traced the development of law on its sentimental and political side. Magna Charta was a summary of all the good maxims as to past law. As a political war-cry in the contests against tyrannical kings it was made to express all noble aspirations for liberty. This, it may be said, is mere sentiment; yet it is a sentiment which has been progressively getting itself embodied in political institutions for many centuries. All history is, in a sense, an evolution of sentiment. As the common law courts, beginning with the middle and lower classes, substituted judicial processes for feudal violence and brutality, the sentimental fondness of the people for their own good laws and customs became embodied in enduring institutions. This mere sentimental fondness for law had become so strong in the Tudor century that dukes and earls and bishops were all made alike subject to the common law of the land. Finally, when the Stuarts proposed to place themselves above law, Sir Edward Coke voiced the sentiment of the nation when he said, "Magna Charta knows no sovereign." Even kings became subject to law. Then, if king, and church, and all rulers are subject to the law, to whom must we look

as the determiner of the law. To the enfranchised nation: the democracy. Law is an expression of the will of the nation. This is the present Anglo-Saxon view of law.

(1) In the first chapter in these lessons the statement was made that there were two contradictory views of law corresponding to two sorts of States. One, that law, in its essential nature, is an expression of the common will, that it limits the power of rulers, that it tends to fulfilment in the perfectly self-conscious and co-operative State.[1] According to the other theory, law is something imposed upon the people, something which rests for its sanctions not upon the common will but upon brute force. It is an expression of the will of one or of the few. It is a command delivered by a master to slaves or subjects. The logical conclusion of such a theory is the Asiatic despotism. This last view has, however, been the accepted theory of law even in democratic countries. It is easy to understand how a master gives commands to slaves and enforces his commands by the lash. It is not easy to understand how the people set the law for themselves and how its enforcement rests upon the common will. In the case of such countries as Switzerland, England, and the United States, we can recognize the fact that the people are themselves the source of law, but its explanation can never be made quite so easy and obvious as can that form of government which is typified by the master and the lash, or by the savage chief with a war club in his hand.

(2) The theory that law has a despotic origin and that law is in its nature something imposed by brute force cannot be brushed aside as an obvious error. Both history and the opinion of the wise give strong support to that view.[2] In former lessons I have traced briefly a sentimental and political view of law which leads up to the democratic State. I believe that view is correct and important, but it does not express the whole truth. A much longer history might be written in support of the view that from beginning to end law in England has been a series of impositions despotically inflicted and enforced. In support of such a view there is no end of illustration. It must be conceded that all classes have at one time or another been made victims of innumerable brutalities in the name of law. These are facts which must be recognized. Yet in favor of the democratic theory of law we have in England today the solid conclusion of the democratic State. Do slavery, and brutality, and tyranny, tend in themselves to produce a democratic State? History seems to answer this question emphatically in the negative. Those institutions have tended to dehumanize the race, to destroy the State, or to produce an Asiatic despotism. In England, then, there have been two States contradictory in character struggling for ultimate expression.

Had Stuart despotism prevailed, Magna Charta would have had a sovereign; and the Charter would have become in time a nameless and vanishing dream. What we now know as law would in time have become

as obscure as such a thing is to any savage. The association of law and liberty and the early struggles for liberty are being glorified because liberty has triumphed and the democratic State is becoming an accomplished fact.

Had despotism met with a like triumph quite another order of facts would be of primary importance in accounting for the result. And the facts making for despotism are as abundant and as well attested as are those making for liberty. Democracy has triumphed not because of those facts but in spite of them.

The present democratic constitution of England is the product of the progressive association of law and liberty. The constitution is observed and obeyed by monarchs, by ministers, by Parliaments and magistrates; yet in England it is not a part of the positively enacted law of the land. In a sense, the constitution is of higher authority than any positive law, because it more directly represents the primary source of all law. The constitution is above positive law, because it more directly represents the will of the commonwealth. It is a series of understandings which render possible the existence of the State. No citizen, no officer, has a right to obey any positive law if in so doing he betrays or ruins the State. The constitution is above positive law, because it is that which gives to positive law its meaning and its reason for existence.

In the development of the democratic State positive law tends to follow the analogy of the constitution and

become a ruler of action recognized and freely observed by the citizen. Law has fulfilled its mission when its provisions have become freely and universally observed, or when there have been changes in conduct such as to render its provisions inapplicable, or when it takes its place as a convenient rule of conduct such as voluntary societies are wont to observe. In the democratic State the enactment and enforcement of positive law hold a place among the agencies for educating and training its rudimentary, defective, and immoral members.

SUPPLEMENTARY READING

CHAPTER IV

The Two Theories of Law

[1] **Legislative Function.**—"For since it can never be supposed to be the will of society that the legislature should have a power to destroy that which every one desires to secure by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are therefore absolved from any further obedience, and are left to the common refuge which God hath provided for all men against force and violence.

"Whensoever, therefore, the legislature shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavor to grasp themselves, or put into the hands of any other an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it absolves the people, who have a right to resume their original liberty, and by the establishment of a new legislature (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society."—*Locke's "Civil Government," p. 306.*

[2] **The Province of Jurisprudence.**—1. The matter of jurisprudence is positive law: law strictly so-called, that is, law set by political superiors to political inferiors. But since by the word law are also denoted, properly and improperly, other objects related to positive law by resemblance or analogy, it is first necessary to distinguish positive law from those various

related objects; in other words, to determine the province of jurisprudence.

2. A law, in the literal and proper sense of the word, may be defined as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. This definition seems to embrace all the objects to which the word can be applied without extension of its meaning by metaphor or analogy, and in this sense law comprises

Laws set by God to men, and
Laws set by men to men.

3. *Laws Set by God to Men.*—To the whole or a portion of these has been sometimes applied the phrase, Law of Nature, or Natural Law. The phrase is also frequently applied to other objects which ought to be broadly distinguished. Rejecting it, accordingly, as ambiguous and misleading, I designate these laws, considered collectively, by the term Law of God.—"*Lectures on Jurisprudence,*" *by John Austin, Vol. I, Part I, p. 3.*

CHAPTER V

THE INJUSTICE OF POSITIVE LAW

THERE can be no law in the Western sense apart from a public moral conscience. The public will, the public conscience, is the source of law. But the public conscience does not admit of being perfectly formulated into positive law and enabled to enforce the penalties suited to each case. The specific requirement is always imperfect and more or less inadequately expressed; hence at best the law partakes of injustice.[1] Even granting that the law as a statement of required conduct is perfect, the agencies for the enforcement of the law are imperfect and hence unjust. The law ought to conform to the highest sense of public morality, but in practice this cannot be reached. Between law and morality there are always observed discrepancies and sometimes contradictions. The man whose morality stops with the requirements of the law is a positively immoral man. He whose honesty does not exceed legal requirement is a dishonest man. Above and around the law there must be an atmosphere of moral sentiment higher than law, and more exacting than law, or else the law itself will degenerate and fail.

(1) The injustice of positive law is a fact which has been universally recognized. We may suppose that

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among the village communities of our Saxon ancestors, when the law rested simply upon the memory and the impressions of the aged, the wise and good members, that there must have been a very close approach of the law to the prevailing moral sentiment. And when wise and unprejudiced judges from the king's court visited the various localities and applied local custom to cases as they arose, the relation of law and morality must have been very close. But, as one judge followed another, the decisions of the courts came to be substituted for the memory of good men as to what was custom. The law became rigid, positive, hardened into fact. Then it was discovered that the law itself was often unjust and sometimes unendurable. To escape the injustice of the common law, appeals were made to the Chancellor, the keeper of the king's conscience, to rectify the injustice of the law. This, it will be seen, was a direct appeal to the source of all law, namely, public morality.[2] Equity courts, apart from the trammels of positive law, proceeded to apply directly to the cases in hand the highest sense of justice prevailing at the time. In course of time the equity courts accepted as law the decisions of former courts. Thus, in equity practice also, the law became rigid and positive, and in many cases obviously unjust. Though a positive statute may come near fulfilling the demands of the highest moral sense at a given time, still circumstances may change and the law may come to have unforeseen and unjust effects. Then, again, the sense of morality

may change. In a progressive State there is ever a higher and more exacting moral sense. From this cause also the law may become an offense to the moral sense of the community. Thus, while law is an attempt to embody and express the moral sense of the community, it at best comes short of the prevailing moral standard.

(2) It is not, however, in the failure to attain good laws that the prevailing moral sense suffers most; it is the failure in administration. We may consent unto the law that it is good and at the same time deplore the unequal administration of the law. A trial is what the name implies, only an attempt to settle a case at law upon principles of justice. Much as our ancestors loved their good laws and customs, they were often at their wits' end in the application of their customs. They honestly tried to reach a settlement by witness, by testimony, and by the wisdom of the aged. Only when these means failed did they resort to ordeal. Yet various kinds of ordeal grew up as a testimony to the failure of the law. Among the Normans in place of the ordeal there had grown up the practice of trial by battle. The two contestants sought to establish the justice of their respective claims by a duel in the presence of witnesses. The trial by battle was always an offense to the moral sense of the English. They compared the trial by battle not so much with their own trial by ordeal as with their trial by the oaths of witnesses. The effort of the English to get rid of the trial by battle and to retain

their trial by witnesses was an important factor in developing and preserving the jury system.

(3) The jury system abundantly illustrates the action and reaction of law upon the moral sense of the community. Whatever may be said of other parts of the public law, the jury system never was arbitrarily imposed upon the people. It grew out of a fusion of customs, among both Normans and English, to which the people were attached. The jury was always understood to voice the sentiment of the local community. It was an attempt to apply the will of the community to the settlement of cases or to the punishment of delinquents. Yet what we call the jury has always been undergoing change. The acts of the jury have never satisfied the moral sense of the community. The system is an attempt to express the moral sense, but it does this imperfectly or inadequately. The national attachment to the jury system has at no time arisen from the conviction that it is an agency for securing exact justice, but has been due rather to the belief that it was less unjust than some other competing system. In its origin the jury did compare favorably with the trial by battle or with the ordeal. The people also preferred to trust the jury rather than the arbitrary decisions of the judge. One of the chief merits of the jury system arises from the fact that it has kept the community as a whole in direct contact with the profoundest intricacies in the administration of law. Thus even the most ignorant have been saved from super-

stitions and legal illusions prevailing in other countries; the most ignorant have remained in full realization of the fact that the administration of law, at its best, is only a crude and imperfect attempt to attain justice. It is the glory of the Anglo-Saxons that the common people have in the main rated lawyers and judges at their true value. If there has been superstition, it has been confined to a limited class who were made the victims of a false education. Through the jury system more, perhaps, than through any other one agency, the sense of guilt on account of the failure of justice has been brought home to the community at large. The jury represents the community. Along with the growing sense of the imperfection and injustice of the courts there has been a growing sense that the guilt rests upon the community as a whole. Thus the fountain of justice has been purified.

SUPPLEMENTARY READING

CHAPTER V

The Injustice of Positive Law

[1] **Law and Equity.**—But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by reconsidering the *reason* and *spirit* of it; or the cause which moved the legislature to enact it; for when the reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise ascribed to Herennius. There was a law that those who in a storm forsook the ship should forfeit all property therein, and that the ship and lading should belong entirely to those who stayed in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree that the sick man is not within the reason of the law; for the reason of making it was to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither stayed in the ship upon that account, nor contributed anything to its preservation. From this method of interpreting laws, by the reason of them, arises what we call *equity*, which is thus defined by Grotius, "the correction of that, wherein the law (by reason of its universality) is deficient." For since in laws all cases cannot be foreseen or expressed, it is necessary that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumtances which (had they been foreseen) the legislator himself would have expressed. And these are the

cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion, as there would then be almost as many different rules of action laid down in our courts as there are differences of capacity and sentiment in the human mind.—"*Blackstone's Commentaries,*" *Vol. I, Sec. 2, No. 5*

[2] **Equity.**—The next instrumentality by which the adaptation of law to social wants is carried on, I call Equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles.

The Equity, whether of the Roman Prætors or of the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body, belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.—"*Ancient Law,*" *by Maine, pp. 27, 28.*

CHAPTER VI

VICARIOUS PUNISHMENT

IN Henry County, Illinois, there were once living Indian tribes and at the same time there were white people who had recently imported the institutions of civilization. An Indian from one tribe slew an Indian in another tribe. The slayer was arrested and brought into the white man's court for trial. Shabbona, the chief of one of the tribes, appeared before the court and alleged that the tribunal had no jurisdiction. The Indians, he said, were living under laws of their own. According to Indian law no crime had been committed. The man under arrest belonged to a tribe in which a child had been slain by a member of the other tribe. The act of vengeance which had led to the arrest was simply an act fulfilling the requirements of the law of the tribe. This case illustrates a principle of universal application in the evolution of justice.[1] There is a family and a tribal consciousness which precedes the development of the individual consciousness. In such a state of society both the committing of crimes and the punishment of crimes are vicarious in their nature. An individual commits an act which makes the whole tribe guilty of murder. In such a case the demand is not that the guilty man be punished, but that the guilty tribe

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upon the bodies of offenders for the sake of their effect upon the minds of possible offenders. In despotic states these practices continue to the present day. A government by force must rely upon vicarious punishments; it must strike terror into the minds of its subjects. But to the mind of the normal citizen in the democratic State such acts are unjust. The democratic State requires a higher and more fully developed moral sense. A democratic State cannot consistently inflict vicarious punishments. Whenever such a State yields to motives of vengeance it reverts to the barbaric state of mind. The citizens in the democratic State prefer to endure vicarious suffering rather than to inflict upon one selected victim punishments which others may perchance deserve. In the democratic State there is a growing sense of guilt on account of the delinquencies of its defective members. The public recognizes its own share in the guilt of its criminal classes. The democratic State will freely spend ten thousand dollars in the prosecution of an offender and then feel entirely satisfied with the imposition of a fine of a hundred dollars. The State expects to suffer at the hands of its criminal classes. It prefers to suffer injustice rather than to do injustice. It prefers to solve doubts in favor of the accused. It would let ten guilty men escape rather than visit punishment upon one innocent man.

(3) In recent years the London County Council has built three school houses upon the ruins of vacant prisons. The prisons were in their day themselves

be punished, and the tribe is punished when one of its members has been slain.

To the moral sense which comes with later development these vicarious punishments appear as rank injustice. And even to the dull and savage man vicarious punishments are not satisfying. The individual is not satisfied with the rude "an eye for an eye and a tooth for a tooth" exacted from the offending tribe. There arises a feeling of personal revenge which among savages expresses itself by inflicting personal torture and mutilation. The growth of personal vengeance tends to weaken the tribal consciousness and to induce anarchy. In its efforts to escape destruction at the hand of the private avenger the early society takes its early lessons in individual distributive justice. A higher type of morality is developed, and from the higher morality there arise crude efforts to apportion justice according to the deserts of the individual offender.

(2) Vicarious punishments, however, continue for ages after all sense of vicarious crimes has been lost. In all good conscience the prudent master visits condign punishment upon one slave for the purpose of inducing a spirit of obedience in the entire class of slaves. Criminals are publicly executed as a warning to the criminally inclined. For the same reason the grim skulls of noted criminals are exposed at the city gate as a warning to the citizens. Cromwell's body was not permitted to rest quietly in the grave. All sorts of punishments and indignities and mutilations have been visited

upon the bodies of offenders for the sake of their effect upon the minds of possible offenders. In despotic states these practices continue to the present day. A government by force must rely upon vicarious punishments; it must strike terror into the minds of its subjects. But to the mind of the normal citizen in the democratic State such acts are unjust. The democratic State requires a higher and more fully developed moral sense. A democratic State cannot consistently inflict vicarious punishments. Whenever such a State yields to motives of vengeance it reverts to the barbaric state of mind. The citizens in the democratic State prefer to endure vicarious suffering rather than to inflict upon one selected victim punishments which others may perchance deserve. In the democratic State there is a growing sense of guilt on account of the delinquencies of its defective members. The public recognizes its own share in the guilt of its criminal classes. The democratic State will freely spend ten thousand dollars in the prosecution of an offender and then feel entirely satisfied with the imposition of a fine of a hundred dollars. The State expects to suffer at the hands of its criminal classes. It prefers to suffer injustice rather than to do injustice. It prefers to solve doubts in favor of the accused. It would let ten guilty men escape rather than visit punishment upon one innocent man.

(3) In recent years the London County Council has built three school houses upon the ruins of vacant prisons. The prisons were in their day themselves

institutions of learning. But as such institutions they represented a lower type of public morality. Of the schools also it may be said that they are institutions for the attainment of justice; and as such they are of a higher grade than are prisons and courts of law. In the Anglo-Saxon world there has been a minimum of cant, and superstition, and humbug about the sacredness of prisons and courts of law. In the minds of the people these at best have stood for crude and imperfect attempts at the administration of justice. English literature and English history abound in evidences of a sense of the injustice of the so-called agencies for the administration of justice. The penitential tears which have made for the purification of society have been shed outside of prison walls rather than inside. The men whom Howard found in English prisons were probably not distinguished for genuine penitence. It is because of the awakened public conscience directed against the injustice and the failure of justice on the part of the agencies of the State that courts of law in England and America have been made worthy of such a high degree of respect. But justice is a thing which does not admit of being administered by mere mechanical agencies and institutions. The Greeks were right when they presented justice as the ideal which challenges the highest endeavor of the citizen.[2] The kindergarten is an institution for the attainment of justice of a higher grade than is a prison or a court of law. Yet if one should find the best system of kindergartens in the world,

where the best of mothers coöperate with the best of teachers, where the child passes from the kindergarten through the best schools which the world affords, such a system would but imperfectly express the just requirements for the education of youth. Nay where the schools are actually the best, there we find the keenest sense of delinquency and imperfection, just as in those places where the courts of law come the nearest to fulfilling the demands of justice there is the keenest sense of delinquency and injustice. The law is not fulfilled, or it is not justly executed, until the principles of the law are written upon the cortex of the brain and have become the habitual guide to the conduct of the perfectly free man. In such a case law and liberty are seen to be identical.

SUPPLEMENTARY READING

CHAPTER VI

Vicarious Punishment

[1] **Primitive Justice.**—Among the English, as among all the races of mankind, justice had originally sprung from each man's personal action. There had been a time when every freeman was his own avenger. But even in the earliest forms of English society of which we catch traces this right of self-defense was being modified and restricted by a growing sense of public justice. The "blood-wite," or compensation in money for personal wrong, was the first effort of the tribe as a whole to regulate private revenge. The freeman's life and the freeman's limb had each on this system its legal price. "Eye for eye," ran the rough customary code, and "limb for limb," or for each, fair damages.

We see a further step towards the recognition of a wrong as done not to the individual man, but to the people at large, in another custom of early date. The price of life or limb was paid, not by the wrong-doer to the man he wronged, but by the family or house of the wrong-doer to the family or house of the wronged.

Order and law were thus made to rest in each little group of English people upon the blood-bond which knit its families together; every outrage was held to have been done by all who were linked by blood to the doer of it, every crime to have been done against all who were linked by blood to the sufferer from it. From this sense of the value of the family bond, as a means of restraining the wrong-doer by forces which the tribe as a whole did not as yet possess, sprang the first rude forms of English justice.

Each kinsman was his kinsman's keeper, bound to protect him from wrong, to hinder him from wrong-doing, and to suffer

with and pay for him, if wrong were done. So fully was this principle recognized that, even if any man was charged before his fellow-tribesmen with crime, his kinsfolk still remained in fact his sole judges; for it was by their solemn oath of his innocence or his guilt that he had to stand or fall.—*"A Short History of the English People," by John Richard Green, pp. 2, 3.*

[2] **Law and Ethics.**—The ethical decisions of a community have no express mouthpiece. Our only tribunal is an ideal and abstract one; the practical judgment, as Aristotle saw long ago, must measure itself by the imagined judgment of a reasonable man. It must here be noted that we are speaking to Englishmen, and of the state of things which we find in England. We do not forget that at sundry times and in sundry ways attempts have been made to set up a kind of ethical judicature, and to put ethics on the footing of positive law. Thus, a large party in the Roman Church regards the Pope as being in a strict and proper sense the final judge (if not also a legislator) in questions of morality, and his formal decisions on such questions as being indisputable all the world over, in like manner as the decision of the House of Lords on a point in English law is indisputable in England.—*Pollock's "Essays in Jurisprudence and Ethics," p. 271.*

QUESTIONS FOR REVIEW. PART IX

1. Can a despot make and execute laws? If the autocrat rules according to law, does he remain an autocrat? Are slaves subject to law? Are bees subject to law? How is law related to liberty?

2. To what fact do the English owe the preservation of their early laws and liberties? What induced the Barons to defend the liberties of the English? What is Magna Charta? Who were the chief defenders of the charter?

3. How were slavery and serfdom abolished in England? What classes were earliest law-abiding? How did the barons and higher nobility become subject to law? How were kings made subject to the law? If all are subject to law, who is sovereign?

4. What are two contradictory meanings of law? Which is the more easily understood? If Stuart despotism had become permanent in England, what would have become of Magna Charta? Does English history furnish support to the view that law is something imposed by force? Is the English constitution above law? In a free State, is there a moral sense higher than law?

5. Are positive laws always imperfect? In a free State does law always do violence to the highest moral sense? Why was equity developed? Can just laws be

justly executed? Explain the origin of the jury. What are some of the chief uses of the jury?

6. What is a vicarious crime? What is a vicarious punishment? Is a vicarious punishment just? Is it just that the State should suffer on account of its delinquent members? Is it more nearly just to suffer wrong than to do wrong?

SUBJECTS FOR SPECIAL STUDY

1. Practical Jurisprudence. A comment on Austin by E. C. Clark.

2. English history leading up to Magna Charta.

3. "History of English Law." Pollock and Maitland.

4. Triumph of Law in Tudor and Stuart centuries in England.

5. Maine's "Ancient Law."

6. Modern tendency to substitute schools for prisons.

PART X

Sovereignty in the States

CHAPTER I

SOVEREIGNTY IN A DESPOTISM

AN immense amount of energy has been wasted in the vain attempt to adjust the Asiatic idea of sovereignty to the Western democratic State. Sovereignty in a despotism is of the nature of a physical fact. One man, or a select body of men, holds the war-club; all the rest are disarmed, and are victims of a power over which they have no control. In such a State, instead of laws to which all are subject, there are arbitrary commands enforced upon victims by brute force. The sovereign is not subject to any law. He it is who issues the commands which all others are compelled to obey. In a large despotic State there naturally grows up a hierarchy of rulers. In the hierarchy there are those who are accustomed to obey commands given to them from above, and at the same time to exact obedience from those below. The word sovereignty came to be applied only to the authority exercised by the head ruler or by the body which held the place of supreme power. In the despotic State there is no law, no universal authority. The sovereign is autocratic;

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THE SULTAN'S PALACE, CONSTANTINOPLE, TURKEY

he gives commands, but he accepts no authority higher than himself; he commands but he does not obey.

(1) The autocrat can brook no superior, not even a god. The Mohammedan can admit that there is one God, but the emphasis of his creed must be upon the claim that Mohammed is his prophet. To the Mohammedan subject the successor to the prophet must be in the place of God. To the subject of the Celestial Empire there was no being higher than the Emperor. So long as the Autocrat of all the Russias can induce his subjects to accept himself as the vice-gerent of God his position may be reasonably secure. But, as his subjects read the New Testament and gain the conviction that there is one higher than he, the autocracy becomes imperiled. All despotic governments need the support of religion; yet a religion which leads to the belief that there are divine beings of a higher grade than the despot, who concern themselves with human affairs, tends to destroy despotism. Among the Hebrews there could be no continuous despotism, because to the devout Hebrew there was ever present a God in Israel ready to vindicate the cause of the oppressed. Likewise, in all Christian States, when a despot has arisen who was disposed to play the part of an oriental tyrant, there have not been wanting those who were ready to call him to account in the name of a higher law. In the Oriental State the sovereign must not only be above law, he must be, in the eyes of his subjects, in the place of God.

(2) In the despotic State a disputed sovereignty means unending and relentless war, or it means a state of anarchy. So far as the masses of the subjects are concerned, there must be no doubt as to who the sovereign is. Of course, in the history of despotisms there have been disputes as to the order of succession, and by such disputes despotisms have been destroyed. Successful despotisms either avoid such disputes or succeed in keeping a knowledge of them from their subjects.

(3) In the Western, or democratic State the whole reason and philosophy of sovereignty is changed. There has been infinite waste of intellectual effort in the vain attempt to reconcile the Oriental notion of sovereignty wth the democratic State. Sovereignty in a despotism is a physical fact. It rests upon the biggest and most effective war-club. If there is spiritual support it is in the form of terror, superstition, deception, and lying. It is essential in an Oriental despotism that the will of the people shall be broken. An absolute and impassable gulf is set up between the people and the sovereign. They live in distinct worlds. The more effective is this separation the more successful is the despotism. In the democratic State, a condition the exact opposite prevails.

It cannot be too strongly emphasized that not one rational sentence can be written about this much-abused word sovereignty until a preliminary question has been clearly and definitely settled. The question is this:

Which sort of State are you going to talk about? If the discourse pertains to the Oriental despotism, it can be made brief and simple, easily understood, and void of all controversy.[1] If, however, the discussion pertains to the Western democratic State, the groundwork of the discourse is so different that direct comparison leads to confusion. In the democratic State there is and can be no such thing as sovereignty in the Oriental sense of the term.[2] If the word is used at all it must be with an entirely different meaning.

(4) Mr. Austin, writing about the time of the passage of the English Reform Bill of 1832, said: "If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent. To the determinate superior the others are subject: or on that determinate superior the other members of the society are dependent. The mutual relation which subsists between the superior and them may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection."[3] It will be seen that this definition is entirely suited to an Oriental despotism, and it pretty accurately described the European States at the time it was written. For two hundred years there had been a growing sentiment in favor of democracy.[4] There had been those who had put forth elaborate theories in favor of the view that sovereignty

should rest with the people as a whole; but in the Old World there had been no successful attempt to found a State upon the democratic theory. Austin was fatally logical and consistent in his elaboration and exposition of the fundamental principles of the anti-democratic State. The war-club philosophy of which he was an eminent expositor has served to paralyze the brains of millions to the present day. There has been a continuous effort to fit the old cloth into the new garment. It has seemed a pity that so much logic and clear analysis should go to waste. Austin's analysis is correct when applied to the finished despotic State. The democratic States are not yet finished, they are simply in the process of making. Many of the principles of despotism still survive in the most advanced democracies. The majority of the people now living in democratic countries are still victims of despotic modes of thought, of despotic language. Not until quite recently has there been manifest among students of politics a general disposition to rebel against the Austinian mode of thought.

SUPPLEMENTARY READING

CHAPTER I

Sovereignty in a Despotism

[1] **Two Methods.**—All monarchies of which we have any record were governed after two several manners; either by a prince and his servants whom he vouchsafes out of his mere grace to constitute his ministers, and admits of their assistance in the government of his kingdom; or else by a prince and his barons, who were persons advanced to that quality, not by favor or concession of the prince, but by the ancientness and nobility of their extraction.

These barons have their proper jurisdictions and subjects, who own their authority and pay them a natural respect. Those States which are governed by the prince and his servants have their prince more arbitrary and absolute, because his supremacy is acknowledged by everybody; and if another be obeyed, it is only as his minister and substitute, without any affection to the man. Examples of these different governments we may find in our time in the persons of the Grand Signor and the King of France.

The whole Turkish monarchy is governed by a single person, the rest are but his servants and slaves; for distinguishing his whole monarchy into provinces and governments (which they call Sangiacchi) he sends when and what officers he thinks fit, and changes them as he pleases. But the King of France is established in the middle, as it were, of several great lords, whose sovereignty having been owned, and families beloved a long time by their subjects, they keep their preëminence: nor is it in the king's power to deprive them without inevitable danger to himself.—"*The Prince*," *by Niccolò Machiavelli* († 1527) *pp.* 28, 30).

[2] **The Patriarchia.**—Slavery is so vile and miserable an es-

tate of man, and so directly opposed to the generous temper and courage of our nation, that it is hardly to be conceived that an "Englishman," much less a "gentleman," should plead for it. And truly I should have taken this, as any other treatise which would persuade all men that they are slaves, and ought to be so, for such another exercise of wit as was his who writ the encomium of Nero, rather than for a serious discourse meant in earnest, had not the gravity of the title and epistle, the picture in the front of Sir Robert's book, and the applause that followed it, required me to believe that the author and publisher were both in earnest. I therefore took the "Patriarchia" of Sir R. Filmer into my hands with all the expectation, and read it through with all the attention, due to a treatise that made such a noise at its coming abroad, and cannot but confess myself mightily surprised that, in a book which was to provide chains for all mankind, I should find nothing but a rope of sand, useful, perhaps, to such whose skill and business it is to raise a dust, and would blind the people the better to mislead them, but is not of any force to draw those into bondage who have their eyes open, and so much sense about them as to consider that chains are but an ill wearing, how much care soever hath been taken to file and polish them. . . . His system lies in a little compass, it is no more than this: "That all government is absolute monarchy;" and the ground he builds on is this: "That no man is born free."—*Locke's "Civil Government," Bk. I., Ch. I.*

Legal Limitation.—"Now it follows from the essential difference of a positive law," says Austin, "and from the nature of sovereignty and independent political society, that the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation. A monarch or a sovereign number bound by a legal duty were subject to a higher or superior sovereign; that is to say, a monarch or a sovereign number bound by a legal duty, were sovereign and not sovereign. Supreme power limited by positive law is a flat contradiction in terms.

"Nor would a political society escape from legal despotism, although the power of the sovereign were bound by legal re-

straints. The power of the superior sovereign imposing the restraints, or the power of some other sovereign superior to that superior, would still be absolutely free from the fetters of positive law. For, unless the imagined restraints were ultimately imposed by a sovereign not in a state of subjection to a higher or superior sovereign, a series of sovereigns ascending to infinity would govern the imagined community, which is impossible and absurd."

That this reasoning follows as a logical necessity from our definition of law, is without question. It is to be remembered, however, that by the term "sovereign power," we refer to the highest power of the State without reference to the manner in which this power is exercised or in whose hands it rests. When we come to consider the determinateness with which the sovereign power may be located, we shall find it necessary to differ somewhat from Austin.

In every politically organized community, then, there exists a public authority to which, from the legal standpoint, all interests are potentially subject, and therefore liable to regulation and control by the State when this ruling power decides them to be of public interest.

It is true that there are, and have been since the earliest times, certain subjects that it has seemed just and proper should be left to the free exercise of the individual, and it does not seem reasonable to expect that the time will ever come when this opinion as to many of these subjects will be changed. But this is by no means the same thing as saying that these subjects constitute a domain that can never be entered by the State.—*"An Examination of the Nature of the State," by Westel Woodbury Willoughby, Ph.D., page 182.*

[4] **Sovereignty in France Under the Bourbons.** — To understand the French monarchy, one needs to begin one's study at the time that Louis XI. broke the military power of the nobles by his defeat of Charles the Bold. From that time the royal power grew rapidly. The Reformation, it is true, increased the political influence of the nobles, and for a time it looked as if there might be two states in France, one Protestant and the other

Catholic. But Henry IV., and after him Richelieu and Mazarin, annihilated the power of the nobility, and built upon its ruins an absolute monarchy.

Although France remained broken up into great feudal estates, their lords had grown so subservient as to have become what Carlyle contemptuously calls them, "gilt pasteboard caryatids of the throne." By the seventeenth century France had become the one strongly centralized—it would almost be possible to say, the one modern—state in Europe. It was, in fact, the political marvel of the day. It alone of all the European powers had emerged more resplendent from the awful century and a half succeeding the Protestant movement in Germany. It was not only leader in thought, in art, in manners; it was practically dictator in European politics. The Peace of Westphalia, which in 1648 brought to a close the Thirty Years' War, was to all intents and purposes a French document, announcing that Louis XIV. proposed to control the policy of every continental state.

It is true such pretensions could not and did not long endure, and after the victories of William of Orange, the Duke of Marlborough, and Prince Eugene, and even after the revocation of the Edict of Nantes (1685), the Grand Monarch's influence had waned in international affairs.

But so thoroughly had the work of Richelieu and Mazarin been done that the monarchy itself was no loser by national misfortune. It even grew the more absolute, and France the more unified. And this in the very century in which Germany had barely missed committing suicide in the Thirty Years' War, and England had been rent in twain by Roundhead and Cavalier!

The records of the time show clearly enough that the French monarchy was the envy of European kings. And well it might have been in the eyes of a ruler like Charles I. of England. "*L'état, c'est moi!*"—"The state? 'Tis I!"—is the definition that legend makes Louis XIV. give of France, and there is no more symbolical picture than that of the young "Sun King" as with the equivalent of these words on his lips he walked into the meeting of the Parlement of Paris, and, with riding-boots on his feet and riding-whip in his hand, addressed the kneeling commoners.

The regency of Orleans and the reign of Louis XV., though fatal to the morals of the court, none the less increased the absolutism of the king. As all power belonged to the monarch, so all property. Montesquieu saw in monarchy a despotism limited only by the sale of public offices. Blackstone, writing in the eighteenth century, classes France with Turkey. The Sorbonne, the great theological court of the nation, said that all the property of his subjects belonged to the king, and that in taking it he took simply what was his own.

The one remaining check upon his action, the High Court of Paris (*Parlement de Paris*), was suppressed during the last years of Louis XV., and replaced by a most unpopular new court, named after the minister who brought it into existence, the Court (*Parlement*) of Maupeou. Of anything resembling a representative legislative body for the entire nation, there was no trace for the one hundred and seventy-five years preceding 1789. (But it should be noted that provincial assemblies continued to meet and preserve, however imperfectly, the thought of representation.) The legislature, like the administrative power, was centered in the king. The legal phrase summed up the whole matter, "As the king wills, so the law wills."—*"The French Revolution," by Shailer Mathews, pp. 2-4.*

CHAPTER II

SOVEREIGNTY IN A DEMOCRATIC STATE

THE despotic State is openly and avowedly founded upon the relation which subsists between a master and a slave. It is the part of the master to command: it is the part of the slave to obey. The sovereign in the State is in the place of master: the subject is in the place of slave. In a large household of slaves there arises a hierarchy of commanders, but good order requires that there shall be one determinable head who gives commands and is himself not under command. He is the sovereign head, sub-commanders are but his mouth-piece. There is thus one master whom all slaves are equally bound to obey. Likewise, in the finished and orderly despotic State there is one master, one determinable head who commands the obedience of the people. The sovereign head himself receives commands from no one. He is sovereign; the people are subject. He is independent; the people hold to him the relation of dependents. This is the simplest form of the State. Add to this, it is the original form. It has held the field for many thousand years. All language, all literature tends to fix this form in the minds of all people who attempt to think and talk about government; hence it is not at all strange that there has

been a persistent attempt to describe the democratic State in the language of despotism. We ought not to expect that a single generation of democrats would create a nomenclature as rich and varied as six thousand years of despotism.

(1) What then does the word sovereignty mean as applied to a democratic State? Probably no such word would ever have been invented if human society had always been organized upon the basis of a coöperative brotherhood. So soon as there was a serious attempt to found a State on the democratic idea, sovereignty became lost in the midst of legal phrases and distinctions. In the Constitution of the United States[1] the word does not occur. The Constitution does say that the constitution and the laws and treaties made in pursuance thereof shall be the supreme law of the land. But in the Asiatic sense it recognizes no sovereign. No person, no determinate body, is in a position to command obedience. Every officer, every body of officers, acts under the restraint of law. In the United States where is the man, or where is the determinate body of men in respect to whom the great body of the people are in the position of dependents and subjects? Who are our determinate sovereign rulers? We have none.

It was the definite intention of the founders of our government that the relation of sovereign and subject should not exist.[2] The people, however, did create many and diverse agencies through which the brotherhood should act. The people as a whole are not sov-

ereign in the Asiatic sense. The people do not issue commands to their Governors, Presidents, and Legislatures, and demand of them servile obedience. The people assume that all these are men like themselves, and that they will guard the true interests of the brotherhood. A wide discretion is left to the various high officers. If a particular officer proves to be weak or criminal, decent and orderly methods of discipline are provided to save the State from injury. All are under law and all share the responsibility of command. A democracy is a self-conscious coöperative brotherhood. In a perfect democracy no class and no individual would be subject to unrestrained despotic power. Delinquents and defectives would be dealt with under beneficent and wholesome laws.

(2) But the people of the United States, although the word sovereignty was not in their constitution, became victims of a fatal despotic theory upon the subject. One section of the country became convinced that sovereignty of the true Asiatic type rested with the several states. In other sections the view prevailed that sovereignty rested with the general government. The leaders of the state sovereignty party became infatuated with the notion that the states had a right under the constitution to resume the exercise of all their sovereign powers. This was not the only cause of the great Civil War, but all will admit that it was an important cause. It may well be doubted whether there would have been any war had not the leaders of

the South been honestly convinced that the states had a right to resume the exercise of sovereign powers. We had our war, and we may conclude that the question is settled that our states have not sovereign powers, though no farther positive contribution is made to the settlement of the question as to who is sovereign. It is now a historical fact that the Federal government did at one time put forth power adequate to the suppression of a formidable rebellion. There still remain, however, enough unsettled questions as to the precise location of the exercise of sovereign power and responsibility to furnish basis for an unlimited number of civil wars. There will be no safety to the Republic until there has been developed in the minds of the people a clear perception of the fact that in a democracy, sovereignty, in the Asiatic sense, does not exist. The very object of the democracy is to eliminate the relation of sovereign and subject.

(3) For ages the minds of philosophers were oppressed with the question as to how the solid earth was supported. Many devices were invented for the sake of psychological relief. Relief finally came with the acceptance as literal scientific fact of the statement, "He hangeth the earth upon nothing." A similar state of mind is manifest in the first crude attempts at thinking and philosophizing about the State. The rudimentary philosopher feels the need of a turtle or some other definite physical monster to serve as a support for the entity which we call the State. And such a

philosopher has ever before him an example of the sort of State which does rest upon a physical monster which is far from being imaginary. The Russian State rests upon the State railway, State telegraph, the bureaucracy, the army, while all center in the Chief Person. Such a State does rest upon a physical basis. It rests upon the fact of superior brute force. And the determinate person or persons who wield this force are in the position of sovereign, while the people are subjects and dependents.

The democratic State on the other hand rests not upon a physical but upon a spiritual fact. It assumes a common sentiment, a common purpose, a common will. The State rests upon that common will.[8] The officers of the State one and all are organs of the common will. There is no rational basis for an enduring democracy except upon the assumption that a spirit of good will and benevolent intent towards all classes and all individuals pervades the State in all its acts. The true democratic State has nothing to impose upon anybody. On the contrary, it seeks to prevent all classes and all individuals from being imposed upon. The democracy seeks by positive and aggressive means so to train and so to educate all classes and all individuals in habits of the observance law, in habits of respect for the highest rules of conduct, that each may be freely left to do what he pleases.

Does not the democratic State have its defectives? Are there not the insane, criminals, infants, to be dealt

with? True, but there is a radical difference in the characteristic treatment of defective classes in the two sorts of States. The despotism treats its normal subjects as dependents. Its safety oftentimes requires the pauperization of the multitude. The consistent democracy, on the contrary, must treat all classes from the standpoint of friendly coöperation. It must seek to discover and develop in all those, qualities of character which will make of them free members of society.

A State cannot adopt a policy imposing permanently even a just government upon a subject people and continue to be a democracy. When Lee surrendered, the South was conquered in the despotic sense only. Had the work stopped there the United States had ceased to be a democracy. The South began to be conquered, in the democratic sense, when the last military governor left the land and the two sections of the country began to forget the relation of victors and vanquished.

SUPPLEMENTARY READING

CHAPTER II

Sovereignty in a Democratic State

[1] **The Constitution of the United States.**—The fundamental and organic law of the nation was framed by the Constitutional Convention which met in Philadelphia, May 25, 1787, and adjourned September 17, 1787.

It was not ratified without a serious struggle, the result remaining doubtful for many months after the adjournment of the Convention. Delaware was the first state to accept it (on December 7, 1787), the ratification being prompt and enthusiastic. Pennsylvania was the second (December 12). The opposition was sharp, but Franklin was President of the State, and Wilson a delegate to the State Convention. The ratification was effected by a vote of forty-six to twenty-three. On December 18, New Jersey followed, and Georgia less than a month afterward. In these states the vote was unanimous. Next came Connecticut (January 9), by a vote of one hundred and twenty-eight to forty.

The first close struggle was in Massachusetts, but the Constitution was ratified on February 6 by a vote of one hundred and eighty-seven to one hundred and sixty-eight. Maryland came next, and then South Carolina. In Virginia the opposition to the Constitution was led by Patrick Henry, while James Madison and Governor Randolph were the leading champions of the new Constitution. The debate lasted for a month, and the interesting report may be found in the volumes of Elliott.

The ratification prevailed June 25, by a majority of ten in a vote of one hundred and eighty-six. After all, it was probably the influence of Washington which won the day. Meanwhile, the state of New Hampshire ratified the Constitution, but the news had not reached Virginia.

Homes of the Mighty

THE IMPERIAL PALACE, BERLIN, GERMANY

Another close battle was fought in New York, but Hamilton and his party finally won a memorable victory, and New York came into the Union on the 26th of July, with a majority of only three votes. The ratification by nine states having been certified to the Congress of the Confederacy, that body adopted a resolution fixing the first Wednesday of March, 1789, as the day when the new government should go into operation. As the day fell on the 4th of March, that day became fixed for the beginning and end of congressional and presidential terms.

"**Parliamentary Sovereignty.**—When there is a *rigid* constitution, to use the convenient term introduced by Mr. Bryce and Mr. Dicey, there cannot be any one body in permanent existence or habitual activity which possesses unlimited sovereignty. The nearest approach to Parliamentary sovereignty as we have it in England must be sought, in every such case, wherever the ultimate power of altering the written constitution is placed by the constitution itself. In the United States, for example, this amending power is exercisable only with the consent of three-fourths of the States expressed by either their legislators or in special conventions; and, moreover, no State can be deprived of its equal suffrage in the Senate without its own consent. The English doctrine of absolute sovereignty is not capable of being usefully applied to constitutions of this type. In fact it is a generalization from the "omnipotence" of the British Parliament, an attribute which has been the offspring of our peculiar history, and may quite possibly suffer some considerable change within times not far distant. Such a constitution as that of the United States or of Switzerland may be said to give a definite meaning to the sovereignty of the people, as opposed to the power or caprice of transitory majorities.—"*First Book of Jurisprudence*," *by Frederick Pollock, p. 260.*

"**Sovereignty: Who Gives Law?**—If, then, law be a product of national character, if the power of the community must be behind it to give it efficacy, and the habit of the community in it to give it reality, where is the seat of sovereignty? Whereabouts and in whom does sovereignty reside, and what is sovereignty? These, manifestly, are questions of great scope and complexity, and yet questions central to a right understanding

of the nature and genesis of law. It will be best to approach our answers to them by way of illustrations.

In England, sovereignty is said to rest with the legislative power: with Parliament acting with the approval of the Crown, or, not to disuse an honored legal fiction, with the Crown acting with the assent of Parliament. Whatever an Act of Parliament prescribes is law, even though it contravene every principle, constitutional or only of private right, recognized before the passage of the Act as inviolable. Such is the theory. The well-known fact is, that Parliament dare do nothing that will even seem to contravene principles held to be sacred in the sphere either of constitutional privilege or private right. Should Parliament violate such principles, their action would be repudiated by the nation, their will, failing to become indeed law, would pass immediately into the limbo of things repealed; Parliament itself would be purged of its offending members. Parliament, then, is master, is an utterer of valid commands, only so far as it interprets, or at least does not cross, the wishes of the people. * * *

Again, it is said, apparently with a quite close regard for the facts, that in Russia, sovereignty is lodged with the Czar, the supreme master "of all the Russias." That his will is law Siberia attests and Nihilism recognizes. But is there no *de facto* limitation to his supremacy? How far could he go in the direction of institutional construction? How far could he succeed in giving Russia at once and out of hand the institutions, and Russians the liberties, of the United States and its people? How far would such a gift be law? Only so far as life answered to its word of command. Only so far as Russian habit, schooled by centuries of obedience to a bureaucracy, could and would respond to its invitation. Only so far, in a word, as the new institutions were accepted. The measure of the Czar's sovereignty is the habit of his people; and not their habit only, but their humor also, and the humor of his officials. His concessions to the restless spirit of his army, to the prejudices of his court, and to the temper of the mass of his subjects, his means of keeping this side assassination or revolution, nicely mark the boundaries of his sovereignty.—*"The State," by Woodrow Wilson, p. 623.*

CHAPTER III

SOVEREIGNTY OVER INDIAN AND NEGRO

THE relation of the United States government to our subject Indian tribes, may serve to illustrate some of the limitations and qualities of the democratic State. The Indians are in a sense our subjects. We have in many ways imposed our will upon them. Yet as the ideas of consistent democracy have grown in our midst we have entered into the work of training and educating the Indian for citizenship. This is a necessary part of our purpose to become a democratic republic. In the educational policy of this great republic the Indian training school holds a very small place. Yet omit that school, and the spirit and sentiment for which the school stands, and we forego all rational prospect of a free government for our own children. The training of the future democracy cannot leave out the wards of the nation.

(1) But have not the government and the people in many ways played the tyrant over the Indian tribes? It must be admitted that there is a long list of outrages and acts of injustice. But there is also a long list of acts of reparation, of gifts, and concessions. We treat our Indians much as we treat ourselves. There are long lists of acts of spoliation and outrage committed

by government and people against white citizens. Indian and white man are fellow-sufferers, because we have not yet attained unto the perfect democratic State. Under our spoils system of politics we put over the Indian tribe a spoilsman, who steals their blankets, robs them of rations, and is a party to other outrages. After a time the red man puts on the war paint, lifts the scalps of a few innocent white settlers, kills in fair fight a number of white men in our regular army. The braves are surrounded and forced to surrender. Then the wrongs of the Indian are investigated. We honor him for his courage in fighting for his rights. The criminal agent is removed, wrongs are redressed, and the tribe is at peace till after the next presidential election.

How very like this is to the government of our great cities. The lives, and property, and virtue of the good citizens are placed in the keeping of spoilsmen. The people are robbed, they are blackmailed, they have vice forced upon them by the officers of the law. Finally a white chief (a preacher of the gospel or a newspaper editor) makes up his mind that endurance has ceased to be a virtue. He puts on the war paint and calls upon his virtuous fellow-citizens to do likewise. A spasm of civic virtue pervades the body politic. A battle royal is waged at the polls. The criminals are beaten. Some of them are turned out of office. Some reforms are instituted. Then the virtuous impulses begin to weaken, and in a few years the city lapses

again into the hands of the spoilsman. We treat our own kith and kin as we treat our Indian subjects. Nay, our Indian subjects fare better in some respects than the Anglo-Saxon. Great and permanent reforms are already accomplished in our Indian service. It may easily happen that our Indian service shall become almost ideally pure and efficient, while the government still continues to rob and plunder the white man. It could never happen, on the other hand, that a State should rob and plunder a subject people and at the same time maintain a just and upright government for its own citizens. This is especially true of a State which is trying the democratic experiment.

(د) After an Indian war a newspaper made the statement that during the whole history of Indian wars ten white men had been slain to one Indian. It was a mere random assertion, and is undoubtedly erroneous. Yet, if an exact statement could be made as to the casualties in all Indian wars on American soil, it would probably contain an element of surprise. Instead of the white man exterminating the Indian, the Indian, in a small way, has been exterminating the white man. But the Indian cannot complete the task of exterminating the white American. The white American has bigger guns and more of them, and in a matter of self defense is disposed to use them. This proposition does not need proof, it is axiomatic. It is equally true that the white man cannot exterminate the Indian. To the mind of the properly trained democrat

this last proposition is just as axiomatic as the former. There are, however, multitudes of the most intelligent and the most highly educated of men who are utterly incapable of understanding the proposition that it is impossible for the white American to exterminate the Indian. They reason as we may suppose the brute reasons. That is, they go by the pound weight and by the yard stick. To them a moral and spiritual entity is intangible moonshine.

Our ancestors were godly men, who came to this country with the definite intention of civilizing and Christianizing the natives.[1] In the midst of all our faults and acts of injustice this motive has never abated its force. It is more than ever our intention to civilize and Christianize the Indian. We are actually doing this work. This original intention of our ancestors is a part of our moral and spiritual inheritance. Without such an inheritance there would be no America such as we know. There would be no democracy, no safe and orderly society resting upon the will of the people. As well expect to turn the waters of the Mississippi up stream as to expect to retain among Americans a tolerably free government after the people had undergone such a moral transformation as would be involved in a plan to exterminate the red man.

Long before such a change could be reached the white people would have reverted to former habits of exterminating each other. It is now many centuries since deadly feuds were common among the English.

It is not so long since they were common among the Scotch and the Irish. There are even now limited areas in this country where the rule prevails that the men are sacrificed to family feuds. I believe these areas are peopled by pure-blood Saxon families. The Indian in our midst is as safe as the white man. His numbers are increasing and as a people he is growing in wealth and civilization. The same lesson is enforced in our relation to the Negro. With the Negro we did become involved in a definite policy of repression. In relation to the Negro, the white people were sovereign and the blacks were dependent and subject. This condition was endured until the fact became evident that virtual slavery was being fastened upon dependent whites as well.[2] To get rid of this condition, one white man's life was given for every eight black men liberated. And the entire penalty is not yet paid. White men will continue to suffer until the Negroes are trained and inducted into the possession of full, free, and equal privileges in the State.[3]

These illustrations are used for the sake of the principle involved. A democracy may not permanently play the part of the sovereign to a subject people. It may, however, engage in the work of training rude peoples for freedom.

SUPPLEMENTARY READING

CHAPTER III

Sovereignty Over Indian and Negro

[1] **How to Order a Colony** (by the Massachusetts Company, 1629).—And for that the propagating of the Gospel is the Thinge wee doo profess aboue all to bee our Ayme in setling this Plantacon, wee have bin carefull to make plentyfull provision of Godly Ministers, by whose faithfull preachinge, Godly Conversacon, and exemplary Lyfe, wee trust not only those of our owne Nation wilbe built vp in the Knowledge of God, but also the Indians may, in God's appointed time, be reduced to the Obedyence of the Gosple of Christ. . . . For the Manner of exercising their Ministrie, and teaching both our owne People and the Indians, wee leave that to themselves, hoping they will make God's Word the Rule of their Accons, and mutually agree in the Discharge of their Duties; and because their Doctrine will hardly bee well esteemed whose persons are not reverenced, wee desire that both by your owne Example, and by commanding all others to doe the like, our Ministers may receive due Honor. . . . . for that wee haue ordered, that the Body of the Government there shall consist of 13 persons, wee are content the old Planters that are now there within our Plantacon and Lymitts thereof, shall choose two of the discreetest and juditiall Men from amongst themselves to bee of the Government, that they may see wee are not wanting to give them fitting Respect in that wee would haue their consent (if it may bee) in making wholesome Constitucons for Government. Alwayes provyded,' that none shalbe chosen, or meddle in their choice but such as will live amongst Vs and conforme themselues to our Government: . . . And that it may appeare as well to all the Worlde, as to the old Planters themselves, that wee seek not to make them

Slaves, wee are content they shall bee Partakers of such Privi leges, as wee, from his Majesty's espetiall Grace, with great Cost, Paiuor of Personages of Note, and much Labor, have obtained. . . . *From "Hazard's Historical Collections," Philadelphia (1792). Quoted by Albert Bushnell Hart, "American History Told by Contemporaries," Vol. I., Era of Colonization, pp. 178, 179.*

Customs and Manners.—It is difficult to determine on the standard by which the manners of a nation may be tried, whether *catholic* or *particular*. It is more difficult for a native to bring to that standard the manners of his own nation, familiarized to him by habit. There must doubtless be an unhappy influence on the manners of our people produced by the existence of slavery among us. The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it. . . . If a parent could find no motive, either in his philanthropy or his self-love, for restraining the intemperance of passion toward his slave, it should always be a sufficient one that his child is present. But generally it is not sufficient. The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives loose to the worst of passions, and thus nursed, educated, and daily exercised in tyranny cannot but be stamped with its odious peculiarities.

The man must be a prodigy who can retain his manners and morals undepraved by such circumstances. And with what execrations should the statesman be loaded, who, permitting one-half the citizens thus to trample on the rights of the other, transforms those into despots and these into enemies, destroys the morals of the one part and the *amor patriæ* of the other.

For if a slave can have a country in this world, it must be any other in preference to that in which he is born to live and labor for another; in which he must lock up the faculties of his nature, contribute as far as depends on his individual endeavors to the evanishment of the human race, or entail his own miserable condition on the endless generations proceeding from him.

* * * * * *

And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just — that his justice cannot sleep forever; that, considering numbers, nature and natural means only a revolution of the wheel of fortune, an exchange of situation is among possible events — that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest.— *Thomas Jefferson in "Notes on Virginia." Writings of Jefferson, Edited by P. L. Ford, Vol. III., pp. 266, 267.*

[3] **The Afro-American.**— The moral responsibility for slavery, the comparative intellectual capacities of Anglo-Saxon and Negro, the alleged mistakes in Negro education, the vast political questions of which the emancipated race is the centre, are not without importance, but they have nothing to do with questions of personal duty and obligation to a struggling race of American born people. Slavery was a costly legacy for which the nation has paid dearly in numerous ways. Our forbears could have settled it all justly and cheaply. Our question, as an incident of the unwelcome bequest, is what will we do with it for our descendants. The adjustments that will keep peace and harmony between the two races living side by side, when the darker race will number twenty and forty millions, must be made now. . . . The duty of the hour to the Negro is far plainer to the men of today than it was to our forbears in the slavery years of a century ago.—*Robt. C. Ogden, in "From Servitude to Service," pp. VII-VIII.*

If any are still skeptical as to the intellectual capacity of the Negro, they would have their doubts speedily dispelled by a visit to Howard University, where they might observe the Negro youth a few years removed from the cane brake, handling the intricate problems of Greek, syntax, and analytical geometry, with the aptness and facility of the most favored white collegian.—*Prof. Kelly Miller in "From Servitude to Service," p. 19.*

CHAPTER IV

LAW AND SOVEREIGNTY

THE true State is characterized by the supremacy of law, while the Anti-State is characterized by the sovereignty of a person, or of a limited determinate class. In the contest with the Stuart despots in England there were frequent references to the sovereignty of law. But this is a figurative use of the word. The law cannot be sovereign in the same sense in which a despot is sovereign. True, when the law is advanced to a position above the despot, then the despot ceases to exist.[1] There has prevailed a crude notion that the law is something arbitrarily imposed by the sovereign. King Alfred was worshiped in England because he gave the people their good laws and institutions, just as Saint Patrick was worshiped in Ireland because he killed their snakes. In the light of riper scholarship each of these statements is alike mythical. Snakes are not exterminated by one man's *fiat*, neither are laws given to a people by the *fiat* of a chief person. Laws come from the voluntary efforts of a people to dwell together in unity. Laws are discovered rather than made. Wherever a chief person has gotten the reputation of giving to a people a body of laws, either the reputation rests upon a myth or the chief person is a

chief discoverer. He outruns other men in his ability to discern the popular will, and he discovers the lines of least resistance in giving expression to national aspiration. It was only when both Patricians and Plebeians wanted some method of escape from deadly conflict that it became possible for a committee of the two sections to formulate the laws of the Twelve Tables. Lycurgus is accounted a great law-giver because his name chanced to be associated with such laws as were suited to the Spartan brotherhood. It is a matter of small consequence whether Lycurgus was a myth or a real statesman. In either case the laws of Sparta were discovered and adapted: they were not imposed.

With the supremacy of the law the relation of sovereign and subject as defined by Austin ceases to exist. Only by a figure of speech may the law itself be called sovereign. Even greater confusion follows the attempt to put the people, or some determinate portion of the people, into the position of sovereignty in a State which is subject to the rule of law. In such a State every act performed or imagined is subject to law, or subject to a recognized principle of right conduct. In the Spartan State just where did sovereignty rest? Some might say, with the kings; others would name the Ephors; others the Senate; still others would locate sovereignty with the entire brotherhood: some even might include the Perioeci and the Helots. The better answer would be that Sparta was subject to law, and hence sovereignty in the Asiatic sense did not exist.

Homes of the Mighty

ROYAL PALACE, ATHENS, GREECE

Surely no Greek philosopher ever darkened counsel in the vain attempt to find in the Spartan brotherhood a "person or a determinate body of persons" to whom all others in the brotherhood were in the relation of "subjects and dependents." The Austinian might find some comfort in the fact that surely the Helots were in such position, hence above them there must have been a sovereign. As an abstract proposition it may well be granted that the Helots did have a sovereign, yet it may surpass the wit of man to make that sovereign definite and determinate. But the Helot was external and incidental to the Spartan State. He was governed by brute force. Only within the brotherhood was there the rule of law, and within the brotherhood there was no determinate sovereign, because the State was subject to law.

(2) The democratic principle assumes that all the normal members of the State have a positive will in favor of obedience to the law. Stated in another form, legal requirements are the result of efforts on the part of the subjects of the State to discover and observe right rule of conduct. Law abolishes the distinction between sovereign and subject by including all under its requirements. Why then have the wise and the learned continued to apply the term sovereignty to the most advanced democracies? An easy answer to this question is the statement that elements of despotism still remain in all democracies. Many are yet subject to the rule of force or necessity. But this answer is

too easy. Even in the most perfect democracy imaginable there would remain something which would suggest the old despotic relation.

(3) The democratic State is to be explained simply as *one of the voluntary human societies such as men and children with a certain advancement in civilization are everywhere seen to be forming.* The civilized human being is an organizer. When the Swiss went into their forests they were already organizers. When the despot came, the Swiss village pitted its local organization against the tyrant. The Swiss at no time took kindly to the Austinian view of sovereignty. At the time Austin wrote they had scarcely formed anything which he would recognize as a State. Driven to a choice between a despotic State and anarchy, the Swiss at all times chose anarchy, with only such rules of order as they could observe in their local voluntary societies. There is now a well organized Swiss State,[2] but it is a State which has never known a sovereign. The Swiss have had choice of nearly all the sovereigns of Europe, and they have rejected the entire lot. They have preferred their own voluntary societies.

(4) Now what is the difference between the Swiss State and a ladies' sewing circle? If the ladies simply meet to discuss the news of the day as they attend to individual domestic duties, there is a very striking difference. Such a circle is not an organized society, and the Swiss State is a highly organized society. But if the circle develop a common purpose, and if its

members determine to carry into effect a common purpose in accordance with some well understood rules of an equal, or an equitable distribution of burdens and labors, and if they create and maintain organs or agencies for carrying into effect this common purpose, then it will be seen that there is a striking resemblance between the sewing society and the Swiss State. We may assume for purposes of illustration that the ladies have determined to relieve the Village Fathers of all responsibility for the care of the village poor. In such a case the officers of the sewing circle will do a work formerly done by the officers of the village. We may imagine that the officers of the voluntary society and all the members of the society will share all burdens and services, according to rules which the society recognize as just and equal; that all parts of the work will be looked after in just and equal proportion. But such a supposition is too good to be true. In a mere voluntary society the blessings of service are likely to be confined to a limited number. Those most in need of training in the exercise of practical benevolence are likely to drop out and become hardened in habits of selfishness. At this point the mere voluntary society would fail of its chief purpose. The few would be found to bear burdens wholly unjust and unnecessary, while others would be freed from all participation in a work absolutely essential to the development of right character.

SUPPLEMENTARY READING

CHAPTER IV

Law and Sovereignty

[1] **Supremacy of Law.**—That the king is below the law is a doctrine which even a royal justice may fearlessly proclaim. The theory that in every state there must be some man or definite body of men above the law, some "sovereign" without duties and without rights, would have been rejected. Had it been accepted in the thirteenth century, the English kingship must have become an absolute monarchy, for nowhere else than in the person of the king could the requisite "sovereignty" have been found. But, for one thing, nobody supposed that the king with the consent of the English prelates and barons could alter the common law of the Catholic church. If the theory of sovereignty, popular among Englishmen of our own day, be pressed upon the reluctant middle ages, the whole of Western christendom must be treated as one state. Theology can be brought in to explain or to conceal any difficulty that there may be in the conception of a king, who, though subject to no man, is subject to the law. God is subject to law and has even made himself subject to the law for man. The practical question is whether there is any mode in which the law can be enforced against the king.—*Pollock and Maitland's "History of English Law," Vol. I., pp. 160, 161.*

[2] **Nationality and State Sovereignty.**—Much as such institutions resemble our own federal forms, the Constitution of Switzerland rests upon formal foundations such as were laid for our Union by the failure of the Articles of Confederation, rather than upon such as were laid by our war between the States,—upon a federal, that is, rather than upon a national conception. The Swiss Constitution does indeed itself speak of the Swiss

nation, declaring that "the Swiss Confederacy has adopted the following Constitution with a view to establishing the union (*Bund*) of the Confederates and to maintaining and furthering the unity, the power, and the honor of the Swiss nation;" and not even the war between the States put the word *nation* into our Constitution. But the Constitution of Switzerland also, with little regard for consistency, contains a distinct and emphatic assertion of that principle of divided sovereignty which is so much less familiar to us now than it was before 1861. It declares that "the cantons are sovereigns, so far as their sovereignty is not limited by the federal Constitution, and exercise as such all rights which are not conferred upon the federal power;" and its most competent interpreters are constrained to say that such a constitution does not erect a single and compacted state (*Einheitstaat*) of which the Cantons are only administrative divisions; but a federal state, the units of whose membership are themselves states, possessed, within certain limits, of independent and supreme power. The drift both of Switzerland's past history and her present purpose is unquestionably towards complete nationality; but her present Constitution was a compromise between the advocates and the opponents of nationalization; and it does not yet embody a truly national organization or power.

At the same time, the Swiss Constitution leaves open a larger debatable ground between federal and cantonal powers than that which is left open by our Constitution between the powers of the federal government and the powers of the States. The Constitution of the United States limits the federal power by drawing a tolerably clear line between state and national provinces: it distinctly enumerates the powers which Congress shall exercise as well as those which the States shall not exercise (secs. 889-892). The Swiss Constitution, on the other hand, makes no such careful enumeration. It contents itself with such indefinite grants as these: that the federal legislature shall have power to pass "laws and resolutions concerning those subjects which the Confederacy is commissioned by the federal constitution to act upon;" to control the foreign relations of the Cantons; to guarantee the constitutions and territories of the Cantons; to provide for the internal safety, order, and peace of the country;

to adopt any measures "which have the administration of the federal Constitution, the guaranteeing of the cantonal constitutions, or the fulfillment of federal duties for their object;" and to effect revisions of the federal Constitution.

This indefiniteness is due, in large part at least, to the fact that the federal Constitution has not yet been put upon a thoroughly logical basis. Though the drift of national sentiment has been strong enough to give the federal government great powers, it has not as yet been strong enough to give it complete powers within its own sphere. Cantonal jealousy has withheld logical roundness from the prerogatives of the central authorities; with the result of leaving their outlines a little vague.

The Swiss federal Constitution is more definite in guaranteeing to the Cantons their constitutions than our federal Constitution is in guaranteeing to the States "a republican form of government." The guarantee is made to include the freedom of the people and their legal and constitutional rights; the exercise of those rights under representative democratic forms; and the revision of any cantonal constitution whenever an absolute majority of the citizens of the Canton desire a revision.

So deeply is Swiss federal organization rooted in cantonal precedents, that an understanding of the government of the Confederation is best gained by studying first, the political institutions of the Cantons.

At almost all points the federal government exhibits likeness to the governments of the Cantons, out of whose union it has grown. As our own federal Constitution may be said to generalize and supply colonial habit and experience, so the Swiss Constitution may be said to generalize and apply cantonal habit and experience: though both our own Constitution and that of Switzerland have profited largely by foreign example also.

In some respects the Swiss Constitution is more conservative — or, if you will, less advanced — than the Constitution of the United States. Those who have fought for union in Switzerland have had even greater obstacles to overcome than have stood in the way of the advocates of a strong central government in this country. Differences of race, of language, and of religion, as well as stiffly opposing political purposes, have offered

a persistent resistance to the strengthening and even the logical development of the prerogatives of the federal power. The Constitution of the Confederation, therefore, bears many marks of compromise. It gives evidence at many points of incomplete nationalization, even of imperfect federalization. Cantonal institutions are, consequently, upon a double ground entitled to be first considered in a study of the governments of Switzerland. Both their self-assertive vitality, and their direct influence upon federal organization make them the central subject of Swiss politics.—*"The State," by Woodrow Wilson, pp. 306-308.*

CHAPTER V

DEMOCRACY AND COERCION

IN the State of Maryland there was an eminent lawyer, a member of the Constitutional Convention of 1787, who in his old age came to want. The legal profession determined to support him, and the method adopted was an annual contribution of five dollars from each member of the bar. We may conclude that there were some mean lawyers in the State, because we find on the statute-book a law compelling each attorney to pay each year five dollars for the support of Luther Martin. The mere voluntary society was unable to carry into effect the common purpose. In England there is an annual "Hospital Sunday." On this day every person, society, and organization in the realm is expected to make a contribution for the support of public hospitals. At a workingman's Sunday-school I heard the following motive presented: "These hospitals have to be supported. If they are not supported by voluntary contribution their support will come upon the rates, and you know what that means." It would be an ideal democracy if all the citizens were so trained to the observance of just and equitable laws and rules of conduct that each would freely contribute his just share to the support of every public enterprise. On the

other hand, so long as the despotic notion prevails that the normal citizen must be forced to pay his taxes there will never be a just system of taxation. With the prevalence of such a spirit the weak, the helpless, and the ignorant will bear excessive burdens, while the powerful and the immoral will live upon the earnings of the weak. There can be no approach to a just government under any form until the normal citizen assumes a positive attitude in favor of an equitable distribution of public burdens. So long as the normal citizen requires compulsory process, rank injustice will prevail.

(1) In Switzerland, taxation is comparatively just, because in a very real sense taxation is voluntary. In the first place, the laws express the actual will of the community. The burdens of the State are distributed just as any highly intelligent, moral man believes that they ought to be distributed; that is, according to the ability of the tax-payer. The poorest and the weakest are not taxed at all. Not only so, but the other members of the community tax themselves for their support. It seemed fit that the class just above these wards of the State should be taxed, but that the rate of taxation which they should bear should be low. Above these is a class whose just rate of taxation should be higher, and so on, grade after grade, until for the comparatively rich the rate is correspondingly high. These laws for adjusting the rate of taxation according to the financial ability of the tax-payers,

originated among the wealthier classes themselves. I met in Geneva a wealthy banker whose friends claim for him the honor of originating, thirty years ago, the system of progressive taxation, whereby the poor pay a relatively low rate and the rich a relatively high rate. All classes believe in the system. It is in harmony with intelligent public opinion, and expresses the moral sense of the community.[1] The Swiss are not at all affected by that crude notion of mechanical equality born of despotic rule. Every important movement towards democracy has at the same time been a movement towards diversity of condition. It is despotism which tends to reduce all subjects to a dead level of mechanical equality of dependence.

In Switzerland, since burdens are distributed in harmony with the moral sense of the community, the taxes are voluntarily paid. In our American states we have laws requiring a father to support his children — the precise thing which the normal father is disposed to do. Rarely indeed is any compulsion required. Something of the same feeling prevails in Switzerland in respect to the payment of taxes. The American Consul at Zurich gives an instance in a single case of fraudulent withholding of taxes. The exposure called forth universal reprobation. The full penalty of the law took its course without the least suggestion from any quarter of palliation or mitigation.

(2) In the democratic State the aim must ever be towards the free, voluntary observance of laws or rules

of conduct, and to this end the aim must ever be to keep the laws in harmony with the highest moral sense of the community. It is only when the democracy fails in the attainment of this obvious aim that it falls upon the lower plane of repression and coercion.[2] The victim of the war-club philosophy may be wholly unable to see any difference in principle in the case of a democracy confiscating the property of a delinquent tax-payer and the act of a despotic government whose agents lie in wait for the property of its dependent subjects. In the case of the democracy, coercion is an abnormal act, visited upon an abnormal citizen. In the other case it is a normal act, visited upon normal subjects. The democratic principle assumes that laws are freely and voluntarily adjusted to the moral sense of the community. Being thus adjusted, they are freely and voluntarily observed. Only in the case of the unsocial, the abnormal, and the defective is there resort to coercion.

(3) In favor of an intelligent and effective despotism it is urged that it is capable of prompt and decisive action. This must be granted, provided also that there are at the same time energetic, intelligent, and obedient subjects. On the other hand, democracies are accounted weak because there is no recognizable sovereign. Thus far democracies have suffered from an attempt to mix despotism and democracy in the same government. It may easily happen that, as democracy becomes more clearly defined, it may excel in efficiency,

promptness, and adaptability. There are multitudes of questions in respect to which a prompt settlement, even though imperfect, works less injustice than a delayed decision, even though otherwise ideally perfect. Such questions the democracy will naturally differentiate and provide for their prompt and final settlement. The time will surely come when the democratic State will cease to be frightened at itself. Its agents then may have all the power of an ideal despot, while at the same time they are free from the characteristic weakness of the despot — the lack of effective support. Our present democracies are weighted down and hampered and restricted because the people do not believe in democracy. They are still paralyzed by race dread of despotism. As this dread is removed restriction will be taken away and then it will be seen that in respect to all lines of conduct in which promptness and decision are obviously important the democratic State will be preëminently effective.

(4) From this point of view we get the nearest approach to despotic sovereignty which the democratic State furnishes. The democratic State is and ever remains a voluntary society. It has and maintains the essential characteristics of a voluntary society. And being a practiced and experienced voluntary society, under the reign of law, it comes to have a definite and determined will upon a multitude of questions. In this part of its work the agents of the democracy may act with all the promptness and final decision of an

absolute despot. But there is always this difference between the will of the democracy and the will of the despot. The object of the democracy is always some act, some policy, some thing. Only incidentally does the democracy dominate a person. But the object of the despot is always the domination of persons. Moreover, the chief and characteristic aim of the democracy, as respects persons, is the perfection of the race. Its chief aim, therefore, is not the application and administration of ascertained law, but rather the discovery and the application of a more perfect law. The democratic State is growingly conscious of the imperfection and injustice of the many rules which it is accustomed to observe and enforce; yet it will execute them with promptness until better rules are discovered.

Among the enemies of democracy there is endless scorn and contempt for the majority of one as a means of ascertaining justice. Precisely! The application of majority rule is one of the imperfect and often unjust means which democracy uses only in those cases where no better method has been discovered. Counting heads, as Mr. Richie rightly maintains, is a very good substitute for breaking heads. Grant that counting heads gives an undesirable result, half of the time, breaking heads gives an unjust result more often still. And besides, voting even under crude conditions has high educational value. Settling disputes by violence is, on the other hand, destructive of all right education.

SUPPLEMENTARY READING

CHAPTER V

Democracy and Coercion

[1] **The Basis of Apportionment.**—Should one ask why ability is accepted as the basis of apportionment, perhaps the most satisfactory reply would be that it approves itself to the moral sense of man in all cases where common expenditures are met by means of contributions. A church, for example, in which the sense of duty in the matter of payment is more highly developed than in any other voluntary association, holds it as a common law of religious sentiment that the rich member should pay more for common ends than the poor member; and the measure of his greater payment is his ability, all things considered, to bear the payment. This is the New Testament doctrine of service, and its acceptance as a canon of taxation shows that the modern science of finance recognizes one of the fundamental principles of Christian ethics. Not alone in the church is this the rule of service recognized, but in all voluntary associations, whether temporary or permanent, it is admitted as a principle of action, provided only the association acknowledge a solidarity in the interests of its members.

It may, then, be asserted without further comment that the rule of apportionment which calls for the levy of taxes according to the ability of citizens to pay finds its sanctions in the moral sense of the community, and this in all matters of social right and social duties must be accepted as final.—*"Finance," by H. C. Adams, p. 329.*

[2] **Principles of Government.**—"The principles upon which the settlers of Pennsylvania sought to base their government were: (1) Perfect democracy. This hardly needs qualification. For, while the governor was nonelective and to some extent

thwarted the will of the people, this was probably not the original intention, but rather an unexpected development of proprietary rights as construed by the unsympathetic heirs of William Penn. (2) Perfect religious liberty. There was no restriction on the free worship of any orderly sect, and originally no religious test for office, except a profession of belief in Jesus Christ. It is not unlikely that this limitation was imposed by English authority, or from fear of English veto. (3) Perfect justice and fairness in dealing with aborigines and neighbors. Without concerning themselves to define the Indian rights in the soil, whatever existed were purchased, and all complaints were met by an evident desire to recognize in others the same personal privileges they claimed for themselves. (4) The absence of all military and naval provision for attack and defense. They recognized the necessity for force through police and other agencies, in internal disturbance. They would never need any force for attack, because they would never be the aggressors. In the matter of defense, there were differences of opinion." *"Quaker Experiment in a Commonwealth," by Isaac Sharpless, p. 1.*

CHAPTER VI

SOVEREIGNTY IN THE RELATION OF STATE TO STATE

THE acts of a democratic State may be conveniently divided into three classes. First are the acts of discovery. The State aims to perfect the race. To this end it seeks in all ways to advance the bounds of knowledge. The Smithsonian Institution illustrates one phase of this work. Next there are the enterprises in which the State is an agency for coöperative labors as witnessed in works of education, sanitation, transportation, and the like. For the most part these operations go on without any thought of coercion or repression, after the analogy of a purely voluntary organization. There remain the acts of the State which involve coercion and repression. These divisions are not inexhaustive, nor does one exclude the others. It is only in respect to those acts in which coercion is involved that we may discover anything in the democratic State at all resembling despotic sovereignty, and in the enforcement of those crude and imperfect rules which involve coercion the fully developed democratic State may act with even greater promptness and decision than is possible in a despotic State.

(1) Thus far sovereignty has been discussed with

Homes of the Mighty

THE IMPERIAL PALACE, VIENNA, AUSTRIA

reference to the internal affairs of the State. The term is also used to designate relations external. A State is sovereign and independent when it is subject to no external power.[1] Egypt is nominally subject to the Sultan, and in a very real sense it is subject to British rule. Egypt is therefore not a sovereign State. Canada has nearly all the powers of a sovereign State, yet, being a part of the British Empire, it is in a sense subject to the United Kingdom and is not independent. Belgium has agreed with the surrounding States that in time of war its territory shall remain neutral and inviolate. Belgium remains a sovereign State because no limitation upon its action, which the State itself sets, detracts from its independence. It will be observed that so far as the relation of a State to other States is concerned, there is no difference between a democratic and a despotic State. A democracy in its international relations is independent and sovereign in the same sense as an autocracy. There was a time, however, when diplomatic agents of republics were treated with less respect than the agents of monarchies. This discrimination is passing away and the free governments are accorded their full measure of respect and influence. The advent of democracy is, however, working a revolution in diplomatic relations. While diplomacy was in the hands of sovereigns who ruled subject peoples, wars were undertaken on account of the personal spite of sovereign rulers. Subject peoples were sacrificed to gratify the personal ambition of

Grand Monarchs. There were endless dynastic wars; States were sacrificed to the pride of a family. While the home government of a despotism is, as we have seen, largely a matter of intrigue and conspiracy, its international relations are characterized by duplicity and falsehood. With the advent of democracy all this is being changed. The agent of the democratic State is obliged to consult his constituents. He must act in the open. His power of deception and falsehood is being removed.[2] Since monarchs are compelled to hold official relations with the agents of free governments their policies also are exposed to the light of day. Personal intrigue and dynastic wars, of the old sort, have become impossible. The Czar of Russia may be wholly uninfluenced by public opinion in his own realm, but he is controlled by public opinion in his international policy. In many ways the Czar has shown that he appreciates the good opinion of the people of the United States. In the United States we know no sovereign, and he who gets the good will of the people gets all. The Russian government may be callous to the criticisms of its subjects; it cannot wholly disregard the criticisms of the peoples of enlightened Christian nations. The democratic States will inevitably more and more pass by the alleged sovereigns of despotic States and speak directly to the peoples of those States. How much do the people in the United States and in England care about the acts and opinions of the German Emperor? Very properly they care a great

deal just now, because he is in a position to do a great deal of harm. But what do they care for the Emperor's views when weighed against the opinion of the great German people? The enduring factor is the opinion of the nation. A nation can no longer afford to incur the enmity of a great people. Diplomacy must therefore be more and more based upon appeals to a high moral sense. The United States waged a war with the Spanish government, but there has been no war with the Spanish people. We have a higher respect for them and a livelier interest in their welfare than we had before. But to prove the war a success we must hold the respect of the former Spanish subjects, who became our subjects, and we must not allow the lasting enmity of the Spanish people.

(2) In the despotic States the sovereigns are naturally disposed to side with the rulers of other despotic States in their conflicts with their subjects. It was perfectly natural for the parties to the Holy Alliance to coöperate in the suppression of popular uprisings. On the other hand, it is equally natural for democracies to take the side of the people against their oppressive rulers. The abomination known as the Turkish Empire would not today cumber the earth except for the existence of the so-called Christian despots who do not dare to give aid and comfort to an oppressed people struggling for liberty.

(3) There are but the two sorts of States, the voluntary and the despotic. If the people of a given area

do not succeed in making their will supreme, then they will be ruled despotically. The democratic State is therefore a compulsory voluntary association. All people are driven to choice between democracy — that is, government by voluntary coöperation — and government by brute force. Wherever a people refuse, or neglect, or fail, to stand together and maintain their independence under orderly rules of their own choice, despotism in some form must inevitably follow. Democracy is not a mere form of government. The democratic State may assume any form which the people approve. All that the democratic State requires is that the people shall approve and continue to approve. Continued approval assumes continued and even more thorough training in the affairs of the State. In all States there remain elements of despotism. Every failure to secure the active and aggressive will of the whole people in support of the State, strengthens despotic tendencies. All people everywhere are being forced to become active members of a voluntary State upon pain of becoming perpetually subject to despotism.

SUPPLEMENTARY READING

CHAPTER VI

Sovereignty in the Relation of State to State

[1] **Persons in International Law.**—Primarily international law governs the relations of such of the communities called independent states as voluntarily subject themselves to it. To a limited extent, as will be seen presently, it may also govern the relations of certain communities of analagous character. The marks of an independent state are that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control.

It is postulated of those independent states which are dealt with by international law that they have a moral nature identical with that of individuals, and that with respect to one another, they are in the same relation as that in which individuals stand to each other who are subject to law. They are collective persons, and as such they have rights and are under obligations.

These postulates assume the conformity of the nature of such states as are governed by law to the conditions necessarily precedent to the existence of law, because the capacity in a corporate person to be subject to law, evidently depends upon the existence of a sense of right, and of a sense of obligation to act in obedience to it, either on the part of the community at large, or at least of the man or body of men in whom the will governing the acts of the community resides. In so far, moreover, as states are permanently established societies, their works represent a necessary condition of subjection to law.

A society, for example, of which the duration is wholly uncertain cannot offer solid guarantees for the fulfillment of obligations, and cannot acquire the rights which are correlative to them.

It cannot ask other communities to enter into executory contracts with it, and at any moment it may cease to be a body of people capable of being held responsible for the effects of its present acts.—"*Treatise on International Law*," by *W. E. Hall, p. 18.*

[2] **Diplomacy.** — Diplomacy, and we include in this term both its theory and practice, has been of great service; it has continued to soften international relations and to lessen the number of wars. The first negotiators were more frequently the conquered, who, on one side, appeared as pleaders in their own cause, and on the other, conquerors, often brutal, who did not think themselves bound to give any quarter, or obliged to show any consideration. Generally they never met again. Human respect, public opinion, and so many other restraints which moderate the expression of violent passions, either did not exist then, or had no influence. But when, especially after the peace of Westphalia, the custom of permanent missions became general; and the men sent on these missions were chosen either from the higher nobility or from persons frequenting the court, customs of courtesy became established of necessity, the value and importance of which it would be wrong to underestimate. One of the most direct results of these customs was to decrease the number of wars. The facility given the sovereign of a country easily to confer with the representatives of a government with which he had had a dispute, was enough to smooth over many difficulties.

The evils of war are so great that nations generally prefer to come to an amicable understanding rather than expose themselves to them. Besides, the more relations become intimate, or merely frequent between two men, the more they feel a repugnance to commit injustice against each other. This restraint is of course not always strong enough; but, whatever may have been its action before the growth of public opinion, there was no power but that of the diplomatic body capable of putting a certain restraint on governments in their international relations.

The intervention of this body was not caused solely by the solidarity existing between all civilized states, a solidarity close enough to cause to be felt, even in the farm lands of France and England, the effects of a civil war which raged on the banks of the Potomac and the Mississippi.

This intervention is founded also on the principles of eternal morality, and sometimes even it has been able to limit itself to invoking social decorum. It was in this way that the diplomatic corps, led by the representative of France at Lisbon, Hyde de Neuville, prevented, in 1824, by common action, the insurrection of Dom Miguel against his father. And this is not the only act of this kind recorded by history. Diplomacy has more than once modified the severities of war and religious persecution. Diplomacy has thus been an instrument of peace. Why, then, is it in such ill repute? Is not diplomacy often taken as a synonym of cunning and dissimulation? Is not a diplomat, who must be distinguished from the diplomatic agent, in the estimation of many persons, a deceitful man with a talent for "using language in such a way as to conceal his thought?" There was a time when this unfavorable opinion had a certain foundation. But it was not altogether the fault of the institution. We may say here, like master, like man. An ambassador, or minister plenipotentiary, is simply an agent; he is obliged to execute the orders of his government and of the sovereign, "his august master."

At the time when all these sovereigns were absolute monarchs, and some of them despots in the strictest sense of the word, ideas of honor, of loyalty and good faith, were not so general as they are now, and society was not so exacting on this point as at present. It is easily understood why absolute and ambitious princes gave their agents tasks morally reprehensible, and why these agents in order to succeed, had to employ deceit, falsehood, intrigue, and other means, which arouse our indignation. Pursuing an end which frequently it would not do to acknowledge, and generally through means which were still less to be acknowledged, diplomats had also to shroud their actions in the most profound mystery, and their most highly valued power was that of knowing how to speak and say nothing. *"Cyclopedia of Political Economy, Political Science, and United States History," by Maurice Block, Vol. I., pp. 804, 805.*

QUESTIONS FOR REVIEW. PART X

1. Upon what does sovereignty rest in a despotism? Can the despot obey law? How were the Hebrews saved from despotism? What is Austin's definition of sovereignty?

2. Can the democratic State be described in the language of despotism? Does the democratic State need the idea of sovereignty? Are the people sovereign in the despotic sense? Where does sovereignty rest in the United States? What is the foundation of the democratic State? What is the aim of the democratic State in dealing with defectives?

3. Could democracy in America survive the neglect of a class? How does our treatment of Indians resemble our treatment of whites in our great cities? Which race is being exterminated? Could the American democracy exterminate the red man? Could democracy survive the permanent enslavement of the negro?

4. Can law be sovereign? How does law originate? Does law eliminate the personal sovereign? Where did sovereignty rest in the Spartan State? Does law involve voluntary organization? What is the difference between the Swiss State and a ladies' sewing circle? Could the sewing circle without coercive power insure an equitable distribution of society burdens?

5. Can a just system of public burdens be maintained by purely voluntary effort? Can a just system of taxation be attained by coercion? The Swiss experience in matters of taxation? What essential difference is there between taxation in a democracy and taxation in a despotism? May a democracy act with greater promptness and decision than a despotism? In what limited field of action does a true democracy most resemble a despotism? Is majority rule a just rule? Ans. No. It is only less unjust than its despotic substitute.

6. What is a sovereign State? What is the effect of democracy upon diplomacy? Why do despots support despots against popular uprisings? Why do democracies side with oppressed peoples in their struggles for liberty? Why is the enmity of a whole people dangerous? What is the effect of the failure of a people to establish and maintain a democracy? What is the relation of slavery to industry?

SUBJECTS FOR SPECIAL STUDY

1. Austin's view of sovereignty.

2. The hopeless conflict over sovereignty in the United States.

3. Our relations to subject peoples.

4. The triumph of law over Stuart despotism in the seventeenth century.

5. The ever widening field of voluntary coöperation in the democratic State.

6. Modern diplomacy vs. ancient diplomacy.

PART XI

The Sanctions of Law

CHAPTER I

IN A DESPOTISM, FORCE

IN the previous chapter we have seen that sovereignty, as the term is used in a despotic State, does not exist at all in a fully developed democracy. The attempt to attribute despotic sovereignty to a democracy results in confusion. There is constant oscillation between the idea of sovereignty in an ill-defined body called people and sovereignty in some defined agent of the people; and, in neither case, can the despotic notion of sovereignty be applied. We have seen also that the essential characteristics of a democracy are those of a voluntary society, forming plans and carrying them into effect by the free and unforced activity of its own members. The democratic State is a brotherhood, doing through organs of its own choice the things which the members wish to have done. It is only at those points where the essential characteristics of a democracy are still unattained that there arises in the so-called democracies of today a striking resemblance to despotic sovereignty. This distinction may be still further elucidated

by a discussion of the sanctions of law or the methods of enforcing law.

(1) In the despotic State the sovereign issues commands to subjects whose obedience he is accustomed to receive. The law is not a request; it is a demand which carries with it the duty to obey, and certain evil consequences in case of disobedience. These evil consequences are called sanctions. Locke and Bentham have recognized rewards as among the sanctions of law. Not so, says Austin: "Rewards are, indisputably, *motives* to comply with the wishes of others. But to talk of commands and duties as *sanctioned* or *enforced* by rewards, is surely a wide departure from the established meaning of the terms." In the despotic State the so-called laws are commands imposed by a superior upon an inferior or dependent subject. And the subject is not hired or induced or persuaded to obey; he is forced to obey with pains and penalties. The pains and penalties are a part of the law. Nothing else that has been called law can be made so simple, so easily understood. It is the simple relation of master and slave carried up into the relation of sovereign and subject.

Mr. Huxley, by making the essence of law consist in its sanctions, draws a striking comparison between the laws of nature and laws in the State. A law of nature, he says, is the observation that certain effects follow certain causes. While law in the State is simply a statement of what will follow if a man does not do certain specified things. But real law, as the term has

been employed in the history of the State, has never been made so simple as the command of a master to a slave, nor so simple as the uniform fact that a heavy body left unsupported falls to the ground.

(2) Sir Frederick Pollock observes that the aphorism that there can be no law without a sanction cannot be reconciled with the witness of history. "Law, with a good deal of formality, has existed before the State had any adequate means of compelling its observance; and indeed before there was any regular process of enforcement at all." [*First Book of Jurisprudence, p. 23.*] Sir Frederick had in view the growth of law in Europe. To the same purport writes Sir Henry Maine of the ancient Hindus. Great bodies of laws and rules of conduct grew up and found expression in their literature without any suggestion of sanctions or methods of enforcement by the State. It was only when the Brahmans, who were the ruling caste, entered into firm alliance with a king that pains and penalties in the enforcement of law grew up.[1] But Asia, we are told, has produced no State. When kings began to enforce laws by pains and penalties the rudimentary State entered upon a course of destructive despotism which continued until all consciousness of law was lost. Law in Asia was destroyed by the commands and decrees of tyrants, enforced by degrading and brutalizing sanctions. Sir Henry draws a parallel between the Brahmans with the Indian kings and an alliance between the Canonists and the kings in Europe. The union of

the clergy, with their Asiatic conceptions of law, with the kings in the late Middle Ages tended mightily to strengthen the despotic State. Had all European States followed in the footsteps of Spain and France, as might have been but for the freer air of Switzerland and England, the expositor of the democratic State in the distant future would have to class Europe with Asia and say that neither succeed in producing a State.

(3) There is a striking similarity between primitive State-building in Asia and in Europe. In both countries law was built up and became established at a time when there was no supreme authority to enforce it with pains and penalties. Compliance with the law was secured by preaching, by appeal to the moral sense, by training, by friendly interference on the part of neighbors and friends. The courts of law were at first simply voluntary agencies for the assistance of neighbors in composing their differences. The first courts were courts of arbitration. Only gradually and tentatively did the authority of the State encroach upon the voluntary character of the tribunal. Rome had passed its most glorious period in State-building before such a thing was recognized as a crime against the State. Previously courts dealt only with wrongs, not with crimes against the State. It was in 149 B. C. that the first true criminal law was passed and a permanent criminal court was established, and it is interesting to observe that this first criminal statute pertained to the unlawful getting of money by rulers

of provinces.[2] Roman law was built up, just as the Common law was built up in England, just as the ancient law of India grew, through the voluntary and friendly coöperation of the people in their efforts to maintain orderly and just relations. Not until the principles which destroyed the State were well developed did law take that simple and despotic form which makes the essence of the law consist in the infliction of punishments. Maine quotes the following passage from the writings of the Hindus after Brahmans and kings had conspired together to rule by force, and he remarks that it ought to satisfy even Jeremy Bentham: "Punishment governs all mankind; punishment alone preserves them; punishment wakes them when their guards are asleep; if the king punish not the guilty, the stronger would oppress the weaker, like the fish in the sea. The whole race of man is kept in order by punishment; gods and demons, singers in heaven and cruel giants, birds and serpents, are made capable, by just correction, of their several enjoyments." It is because of such a notion of law put into practice in Asia that Asia has produced no State, and the very idea of law had passed from the Asiatic mind until it was aroused by Western ideas.

SUPPLEMENTARY READING

CHAPTER I

In a Despotism, Force

[1] **Religion and Law.** — How then does what we should call Law — that is, law, civil or criminal, enforced by sanctions or penalties to be inflicted in this world — first make its appearance in these books? It appears in connection with the personage whom we call the king. His authority is more or less assumed to exist in the oldest of these treatises, but, all taken together, they suggest that the alliance between the King and the Brahmans was very gradually formed. The most ancient of the books give comparatively narrow place to the royal authority, but the space allotted to the king and his functions is always increasing, until in the latest treatises (such as *Manu*) the whole duty of a king is one of the subjects treated of at the greatest length and with the greatest particularity.

It may be observed that, with the increased importance attributed to the king, there is a change in the sacerdotal view of his relation to the law. In what appear to me to be the most ancient portions of these books, the king is only represented as the auxiliary of the spiritual director. He is to complete and enforce penances. "If any persons," says Apastamba (*II. v. 10, 13*), "transgress the order of their spiritual director, he shall take them before the king. The king shall consult his domestic priest, who should be learned in the law and in the art of governing. He shall order them to perform the proper penance, if they are Brahmans, and reduce them to reason by forcible means, except corporal punishment and servitude, but men of other castes the king, after examining their actions, may punish even by death."

In a later treatise (*Vishnu, III. 2*) the duties of a king are summed up in two rules: he is to protect his people; he is to

keep the four castes, and the four orders of Student, Householder, Hermit, and Ascetic in the practice of their several duties; or, in other words, he is to enforce the whole social and religious system, as conceived by the sacerdotal lawyers. The further progress of change consists in the further exaltation of the personage who in the passage from Apastamba is called the king's domestic priest. In the end, the law books come to contemplate an ideal tribunal composed of the king, with learned Brahmans as assessors. The later writings clothe the king with right divine. He is formed from eternal particles drawn from the substance of the gods.

"Though even a child, he must not be treated lightly, from an idea that he is a mere mortal. No, he is a powerful divinity who appears in human shape" (*Manu, VII. iv. 8*). But he has lost in actual personal power. He can only act with the advice of his Brahman assessors. "Just punishment cannot be inflicted by an ignorant and covetous King, who has no wise and virtuous assistants, whose understanding has not been improved, and whose heart is addicted to sensuality. By a king, wholly pure, faithful to his promise, observant of the scriptures, with good assistants and sound understanding, may punishment be justly inflicted" (*Manu, VII. xxx. 31*).—"*Dissertations on Early Law and Custom*," *by Henry Sumner Maine, pp. 38-40.*

Ancient Conception of Crime.—It may be thought that the difference which I have asserted to exist between the ancient and modern view of penal law has only a verbal existence. The community, it may be said, besides interposing to punish crimes legislatively, has from the earliest times interfered by its tribunals to compel the wrong-doer to compound for his wrong, and if it does this, it must always have supposed that in some way it was injured through his offense. But, however rigorous this inference may seem to us nowadays, it is very doubtful whether it was actually drawn by the men of primitive antiquity. How little the notion of injury to the community had to do with the earliest interferences of the State *through its tribunals*, is shown by the curious circumstance that in the original administration of justice, the proceedings were a close imitation of the series of acts which were likely to be gone through in private life by persons

who were disputing, but who afterwards suffered their quarrel to be appeased. The magistrate carefully simulated the demeanor of a private arbitrator casually called in.

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The true criminal law did not, however, come into existence till the year B. C. 149, when L. Calpurnius Piso carried the Statute known as the Lex Calpurnia de Repetundis. The law applied to cases Repetundarum Pecuniarum; that is, claims by Provincials to recover moneys improperly received by a governor general, but the great and permanent importance of this statute arose from its establishing the first Quæstio Perpetua. A Quæstio Perpetua was a *Permanent* Commission as opposed to those which were occasional and to those which were temporary.

It was a regular criminal tribunal, whose existence dated from the passing of the statute creating it and continued till another statute should pass abolishing it. Its members were not specially nominated, as were the members of the older Quæstiones.

"*Ancient Law*," *by Henry Sumner Maine, pp. 401, 402, 471.*

CHAPTER II

VARIOUS MEANINGS OF LAW

IT IS not true, as the Germans say, that what is clear is true. To a certain type of minds, natural science will never again be so clear as it was in the good old days when the animal and vegetable worlds were as distinct as gold and carbon; when species were seen as permanent and distinct creations. Science was then clear because it was false. It taught as true that which was not true. In like manner political economy can never again appear so clear, as it was made in the writings of Ricardo. It was clear because, as understood by the satisfied reader, it was not true. Like the current science of that day, it substituted an analytic product of the imagination for a reality. For the same reason, he who wants a clear view of law must go to the writings of the analytic expositors, of whom Austin and Bentham are types. These analysts have imagined certain qualities and conditions in the State which, so far as is known, have never had actual existence on earth or in heaven. Then, with positively painful clearness and logical consistency, they have built up an imaginary State which has been accepted as a reality. The philosophers of the Middle Ages have been criticised for spending their time in discussing

such questions as the capacity of a needle point to support battalions of angels, but, so far as appears, this conduct was altogether meritorious. By such activity the human mind was kept alert and in training for future usefulness. And in any event their logical acumen did not inflict positive injury. But no such justification can be put forward for the continued existence of the modern analysts. They continue mental gymnastics about unreal things at a time when there is abundant material for useful occupation. The modern analyst promotes intellectual laziness by luring his victims into a false security. And besides, in the realm of politics he is in danger of inflicting great and positive injury because the subject matter of his reasoning may have close and intimate relations to actual conduct; and conduct based upon error is likely to be injurious. In order to get a truthful view of law in a democratic State one must consent to be less clear.

(1) As stated above, the democratic State is not yet attained: it is only in the process of making. There is still large intermixture of actual despotism, and a much larger mixture of despotic ideas. The content of what is denoted by the word law has ever been changing in human history, and we may expect greater changes as the democratic State becomes more clearly defined. In writing these lessons I have used the word law with a variety of meanings. Sometimes in a single paragraph the meaning of this slippery word would unconsciously change under my pen. I have referred

to the early laws to which our Saxon ancestors were so ardently attached. I have referred to the fact that the Tudor monarchs brought dukes and bishops under the reign of law, while later the aroused English nation made its kings subject to the law of the land. In the first instance, law is a rule of conduct growing out of the efforts of the people to live together in harmony. In the second, law is a rule of conduct imposed upon a particular class. In the last sentence, law means a constitutional principle which is the expression of an aroused and self-conscious nation. I make no apology for having used the word with such a bewildering variety of meanings. The confusion belongs to the subject matter, not to any peculiarity in the use of the term. Words in common use in the description of political phenomena are analogous to living things, and subject to constant change and modification. He who would freeze such words into a precise and unchanging meaning becomes a teacher of error. No one can read history or political literature with understanding who does not gain the power of detecting the ever-changing meaning of the terms in common use.

(2) The two contradictory notions of law coexisted for centuries. The one notion tended always to the formation of the despotic State, the other always to the development of a democracy. Magna Charta is a list of the good laws and customs to which the people were attached. Such laws are enforced by the will of the community. There is little need of pains and penalties.

Home of the Mighty

ROYAL PALACE, THE HAGUE, HOLLAND

Yet in the charter itself the king was specifically brought under law. To make the king obey, special penalties were named; barons were appointed to make war upon him and force him to obey. This involves clearly the despotic notion of law. The king is made to command himself to obey. Then he is made to command the barons to make war upon him in case he should disobey. Such a notion of law always involves an absurdity, except there be a master or sovereign who is above law — who is not under law.

An illustration of the opposite notion of law may be given in the case of the Earl of Leicester, when for the payment of a house tax he gave back to the people their trial by jury. The Normans had introduced trial by battle or duel. After an all-day duel between two neighbors in the vain attempt to settle the dispute, the old Earl's heart was touched and he permitted the people to have their former law.[1] Such a law is enforced by the same motives which lead to its existence. It comes from the people and is freely observed by them. The despotic notion of law came prominently into view whenever there was an attempt to restrain the lawless conduct of tyrannical classes. The obvious method in such a case is command, backed by force. This view of law was always so simple, and the true origin of law was always so mysterious, that the erroneous belief became practically universal, viz., that the king was the fountain of law, and that every law, good and bad, was a command of king or church.[2]

(3) In a previous chapter I have called attention to early meanings attached to the word law as learned from a comparison of the terms used in describing it in various languages. Law, in the primitive society, designates fit and orderly conduct. A declaration of the law is simply a designation of the conduct which had been previously regarded as fit and orderly. We know that in England the people loved their laws because they regarded them as a means of resisting tyrants. The kings came to the aid of the people, enabling them to effectively resist the encroachments of feudal tyrants. But when the king begins to bring the feudal lords under the reign of law, the term takes a new meaning. Yet at no one time is there any sudden or radical change. Feudal law was based upon custom, and when the king restrained the feudal lords, he did it usually in the name of previously existing custom. The law was recognized simply as fit conduct, not as a command imposed by a sovereign. Yet, since the institution of slavery arose very early, traces of the idea of command may be early found associated with the law.

SUPPLEMENTARY READING

CHAPTER II

Various Meanings of Law

[1] **The Towns and Justices.**— Rude as the borough was, it possessed the right of meeting in full assembly of the townsmen for government and law. Justice was administered in the presence of the burgesses, and the accused acquitted or condemned by the oath of his neighbors. . . .

At Leicester, the trial by compurgation, the rough predecessor of trial by jury, had been abolished by the earls in favor of trial by battle.

The aim of the burgesses was to regain their old justice, and in this a touching incident at last made them successful.

"It chanced that two kinsmen, Nicholas, the son of Aaron, and Geoffrey, the son of Nicholas, waged a duel about a certain piece of land, covering which a dispute had arisen between them. And they fought from the first to the ninth hour, each conquering by turns. When one of them, fleeing from the other till he came to a certain little pit, as he stood on the brink of the pit and was about to fall therein, his kinsman said to him, Take care of the pit, turn back lest thou shouldst fall into it.

"Whereat so much clamor and noise was made by the bystanders and those who were sitting around, that the earl heard these clamors as far off as the castle, and inquired of some how it was that there was such a clamor; and answer was made to him that two kinsmen were fighting about a certain piece of ground, and that one had fled till he had reached a certain little pit, and that as he stood over the pit and was about to fall into it, the other warned him.

"Then the townsmen, being moved with pity, made a covenant with the earl that they should give him three pence yearly for

each house in the High street that had a gable, on condition that he should grant to them that the twenty-four jurors who were in Leicester from ancient times should from that time forward discuss and decide all pleas they might have among themselves." —*Green, "History of English People," Vol. I., Chap. 1, p. 219.*

[2] **The Origin of Law.**— The oldest form of law is of course custom or usage known at Rome as *jus moribus constitutum,* and in England as "the common law," which embodies the unwritten but well-known opinions of the community as to social right and wrong. Such customary rules begin as a spontaneous evolution from the popular mind which commits, at the outset, their enforcement to popular opinion, or to the licensed vengeance of injured parties. Such primitive and imperfectly executed morality is transformed into law when, after the organization of the state, it is enforced by its political authority. Thus custom becomes the basis of state law when it satisfies certain requirements, and remains such until it is superseded by judge-made or statutory law. . . . Law, which everywhere begins with custom, is usually formed in close affinity with religion and theology when they begin to emerge from the superstitions of the savage state, and when custom, already settled, and growing more complex with the progress of culture, has enabled civil society to organize itself into institutions. On the one hand, to take vengeance for the killing of a near relative is the duty a pious son or brother owes to the ghost of the slain; while, on the other, the homicide has created a legal right the enforcement of which, by compelling the payment of the usual compensation to be exacted of the slayer or his family group, will also satisfy the religious obligation. As conceived of by the Greeks, law was something "to which all men ought to yield obedience for many reasons, and especially because every law is a discovery and gift of God, and at the same time a decision of wise men;" while at Rome it was committed at the outset, as heretofore pointed out, to the special keeping of the pontifical college. Thus it was that primitive custom, while being transformed into law, passed through the filter beds of religion and theology, whose impress was profound and abiding.—*"The Science of Jurisprudence," by Hannis Taylor, pp. 505-507.*

CHAPTER III

LEGAL SANCTIONS IN THE DEMOCRATIC STATE

AS quoted in a previous chapter, Mr. E. C. Clark defines law as the aggregate of the rules administered by the supreme authority of the State, or rules regulating the constitution and functions of that supreme authority—*"the ultimate sanction being, in both cases, disapproval by the bulk of the members of the State."* Mr. Clark is an acute critic and expositor of Austin's Jurisprudence. He does not distinguish, as I do, between the despotic and the democratic State. Yet I am willing to accept his definition of legal sanction as entirely applicable to the democratic State. It seems to me impossible to apply it to a despotic State. If law is a rule imposed by a sovereign upon a dependent subject, then the statement that, if you do not obey this rule, the sovereign won't like you, can hardly be said to be an ultimate sanction. But, if law is the expression of the wishes of an independent, self-conscious political society laboring together for the common good, then the disapproval of the bulk of the members of that society *is* an ultimate sanction. Any specific punishment which may be attached to the violation of any rule in such a State is simply an expression or an intimation of this ultimate sanction. And

surely in such a State there can be no objection to including the approval of the bulk of the society among the cardinal agencies for securing obedience to the law.

(1) By reference to a former chapter it will be seen that both Locke and Bentham included rewards as well as punishments among the sanctions of law. Austin effectively set this notion aside as inapplicable to the despotic notion of law. When the master commands he does not at the same time coax. If he coaxes and offers rewards he is not at the same time commanding. Commands are enforced by blows. But in the democratic State all this is changed. There are no commands imposed, in the despotic sense. The laws themselves are but the recognition of right rules of conduct by the members of the society. The laws are changed by persuasion, by argument, by preaching, by appeals to the public conscience. In this there is a striking resemblance to early habits and customs.[1] He who leads the way in the discovery of a better law is accounted a benefactor of the State. In such a State, men obey the law chiefly because the law is itself an expression of a strenuous, positive desire on the part of the people. The law enables them to attain more perfectly a desired good. In the enforcement of such a law men are influenced by the good opinion of their fellow-men; they will refrain from disobedience in order to avoid their disapproval. In the democratic State there is no sovereign to impose his will upon the citizen. The sanction of the law cannot rise above the

source of the law, the individual conscience of the citizen and the approval or the disapproval of the community. And this, be it remembered, is not a light sanction. Men often prefer death rather than to face a community whose respect they have forfeited.

(2) By what sanctions, then, are the laws enforced which secure to the youth of the State continuous mental and physical training to the age of sixteen, and then, through the public library and museum, provide material for intellectual and moral growth to the end of life? How is it possible to enforce the laws for the education of the people in a democratic State? Why, these laws are an expression and a fulfillment of the hope and aspiration of all the wise and good who have ever lived. To this end generations have labored and sacrificed. Such laws are enforced by the same motives whereby they have been attained. The laws provide for an obvious, positive good so great that it seems impertinent to suggest either rewards or punishments as a means of enforcement. Men are not hanged or imprisoned for disobeying the school laws. How does it happen that the best and busiest men and women of a community are willing to give days and nights to service on a school committee without any remuneration? Is it not that the natural motives for the right execution of such laws are so high that the offering of money seems a sort of profanity? If the State employs a hangman or a jailor it is fit that he be paid. But the men and the women who properly rep-

resent the State on the local school committee want no money to ensure faithful service. It is like offering money to parents as an inducement to love and cherish their own children.

(3) There are, however, features connected with the laws for the promotion of education which in countries not yet fully trained to democratic ways have to be enforced with pains and penalties. Educational institutions are supported by taxation, and the extremely unsocial man will not even pay his school tax without the threat of coercion. The unsocial child will play the truant, and may have to be caught by the policeman and placed under temporary duress. The normal child goes to school with the utmost avidity; the show of force is necessary only in the case of the abnormal being, and even in these cases the use of force is a failure if it is not so used as to win the child to willing obedience. From beginning to end the work of education by the State is a voluntary work. The State thus organized is a voluntary society. Only so much force may be expended upon the abnormal members of the society as to prevent them from balking the will of the bulk of the society. The ultimate sanction is the approval, or the disapproval, or the determination of the bulk of the members. To think of applying force to the bulk of the members is an absurdity.[2] Force can be rationally employed only where persuasion and reason have failed. And even then force is but a weak and temporary expedient, to be employed as one of the

minor aids to the development of reason. All this can only be applied to the democratic State; precisely opposite rules must prevail in the despotic State. The sovereign in the despotic State must compel the people to believe a great many things about himself which are not true. He must prevent the bulk of the members of the State from using their minds freely. He must promote ignorance upon many subjects about which the people, left to themselves, would gain information. In a successful despotism education, such as is permitted, must be forced upon the people. Likewise a state of ignorance on selected subjects must be determined upon by the sovereign, and this ignorance must be enforced by pains and penalties. In a despotism, no crimes are punished with such unrelenting brutality as the crime of learning and teaching the things that are forbidden; and this is necessary in such a State. The ultimate sanction, then, cannot be the disapproval of the bulk of the members of the State. In a despotism the ultimate sanctions in the execution of its educational laws are the thumb-screw, the red hot iron, the stake, and the axe.

SUPPLEMENTARY READING

CHAPTER III

Legal Sanctions in the Democratic State

[1] **Penances in India.** — With these explanations some features of those writings which are at first sight very perplexing become comparatively intelligible. Thus, they are chiefly called law-books because they contain *rules of conduct* stated with the utmost precision. But what happens to a man if he disobeys the rule? This is the principal question to the modern jurist. What is the punishment, or, as the technical phrase is, the Sanction? Understood in the modern sense, it is hardly noticed in the oldest of these books. It is in fact to be inflicted in another state of existence, and therefore, though it may be asserted, no directions can be given about it. Thus the place which in a modern law-book is taken by the Sanction — that is, by the various penal consequences of refusing to obey a law — is taken in these writings by Penances. You are to punish yourself here, lest a worse thing happen to you elsewhere. These penances are set forth in the most uncompromising language and in apparent good faith.

In one place, the penitent is told to mutilate himself and to walk on in a particular direction till he drops dead. In another he is to throw himself three times into the fire, or to go into battle and expose himself as a target to the enemy. For one great crime he is to extend himself on a red-hot iron bed, or to enter a hollow iron image, and, having lighted a fire on both sides, to burn himself to death. For the comparatively venial offense of drinking forbidden liquor a Brahman is to have boiling spirit poured down his throat.

Other penances are extraordinary from the length and intricacy of the self-inflictions which they suppose. The old books hint a doubt here and there as to the efficacy of penance; what good can

it do, they say, since the evil deed itself remains? still, they add, the authoritative opinion is, that the penance should be performed. "Man in this world," writes Gautama (Buddha) (xix. 2), "is polluted by a vile action, such as sacrificing for men unworthy to offer a sacrifice, eating forbidden food, speaking what ought not to be spoken, neglecting what is prescribed, practicing what is forbidden. They (*i. e.*, some Brahman authorities) are in doubt if he shall perform a penance for such a deed or if he shall not do it. Some declare that he shall not do it, *because the deed shall not perish.* (But) the most excellent opinion is that he shall perform a penance." This opinion is then supported by copious quotations from the Hindu scriptures. The remarkable thing is, that no one of these writers seems to feel, what would be our doubt, whether anybody could be got to perform the severer penances. — "*Dissertations on Early Law and Custom,*" *by Henry Sumner Maine, pp. 36-38.*

[2] **Obedience to Law.** — A second instance is a case of a very different and much humbler kind. A few years ago the "taxes on knowledge" were in full swing, in spite of remonstrances from many of the brightest spirits of that day, who had long seen the utter stupidity of putting a tax, for instance, upon newspapers. The thing became too foolish for endurance. The ruling classes, or persons, were stubborn, and the process of reform had, by strong hands, to be pushed home. A part of that process, and a most efficacious part of it, too, was the publication of unstamped newspapers by keen men who saw clearly enough that the public good required defiance of an absurd and injurious law.

Their defiance took the enlightening form of an object-lesson, and the object-lesson took the appropriate form of the publication of the *Poor Man's Guardian* — *not* as the law directed. Its editor and proprietor, Henry Hetherington, endured twelve months' imprisonment for neglecting to provide his newspapers with a stamp; but those twelve months of suffering did more for the repeal of the taxes on knowledge than any twelve years of argument. A few such cases killed the taxes on knowledge, just as similar cases killed church rates, and just as the repeated

revolt and imprisonment of such men as John Dillon and William O'Brien killed "coercion."

Our third case takes us in quite another direction. What shall we say of the good, law-abiding, peaceful Quakers in America, who a few years ago not only winked at breaking the law, but created an intricate "underground railway" for securing the escape of fugitive slaves? thereby defying the law and depriving lawful owners of valuable property!

This is but a hurried gleaning in a vast and fruitful field, but it will probably satisfy most reasonable people that in this world we have something to do besides repeating platitudes about "law and order." Again and again the history of mankind drives home the conclusion that when the public conscience and public sense are against the law, the rebel ceases and the reformer begins, the fanatic becomes the patriot, the traitor may even become the saint.

Here, of course, we shall be confronted with the objection that when the public conscience and public sense are against the law, the law can now be voted down. Precisely; and we are abundantly willing to admit that, as the government of a country comes to be really based on the will and vote of the nation at large, both the need and the right of resistance will be modified, or will cease. But society is not within measurable distance of being able to do without its forerunners and its idealists, its radicals and its rebels; and these, we may be sure, Nature will never cease to provide — at first, the sorrowful souls, haunted by divine discontents; then the dreamers of strange dreams; and then the leaders of mankind. — *John Page Hopps in "The Westminster Review," April, 1899, pp. 407, 408.*

CHAPTER IV

SANITARY LAWS, AND LAWS TO PROMOTE INDUSTRIAL COÖPERATION

THE health of the people, like education, is a great and positive good to be attained by the coöperative efforts of the State. The same will and purpose and motives which result in the passing of good sanitary laws avail also in their enforcement. In a democratic State the people make and enforce laws for the preservation of health, because they prefer to be alive rather than dead; to be in health rather than sick. In a progressive modern State there are many and diverse laws which have to do with sanitation. Some are readily observed, enforce themselves, as it were; others are enforced with greater difficulty. In respect to some sanitary laws it would be an easy matter for Mr. Huxley to make out a striking resemblance between human laws and the laws of nature, as he defined them. He said the law of nature is simply a way of asserting what invariably happens under given conditions. In this sense it is a law of nature that the small-pox, left to itself, destroys a large proportion of the human family in ways most disagreeable. The penalty of neglect or disobedience is death, and the law is self-acting. The State comes forward and specifies certain

simple methods whereby death from small-pox may be avoided. In a well trained democracy this is all that is necessary. The people freely and gladly do the things required. Only in the case of the untrained, the superstitious, or the prejudiced, are coercive processes required for enforcement. There is little need for the State to affix special pains and penalties for the enforcement of law to prevent the spread of small-pox. I once knew of a case where a man exercised criminal carelessness in this matter, and the ultimate sanction of the violated law was nothing but the disapproval of the bulk of the community. This was expressed in no special or unusual way, yet it was so effective as to induce immediate self-banishment.[1]

(1) There was once a national debate in England upon the subject of compulsory vaccination of infants, following a deadly small-pox epidemic at Gloucester in 1895. The proofs are overwhelming that vaccination is an effective protection against small-pox, yet in the face of these proofs Parliament made the laws for *compulsory* vaccination less stringent than they were before the Gloucester epidemic. One object of this change was to secure more nearly universal infant vaccination. It was the opinion of many of those voting for the law that this end would be better attained by introducing a larger element of volition in its execution.[2] In London, under present experience, about one infant in four millions dies from small-pox, and there is strong evidence that about one in fourteen thousand

dies from the effects of vaccination. Of course, without vaccination and other effective checks it is believed that a large proportion of the people would die with the disease. Large sections of the English people defy the pains and penalties of the compulsory vaccination law. It was believed that they would not so effectively resist the persuasions of a law not compulsory, but supported by a strong and alert public opinion. M. G. Fawcett closes an article on this subject in *The Contemporary Review* for March, 1899, thus: "Let me repeat that all this does not destroy the case for vaccination, but it does destroy the case for compulsory infant vaccination. The demand for vaccination in the presence of an epidemic is so great that it needs no law to enforce it: the resistance to compulsory vaccination when there is no epidemic is so strong and has so greatly increased in strength with increasing knowledge of the subject that compulsory legislation becomes a dead letter and brings the law into disrepute and contempt." This illustrates an important principle and method of the growth of law in a democracy. In the first place the law is itself the result of an effort to discover right rules of conduct. Time was when the only available way of escaping destruction to life was universal compulsory vaccination. With such an alternative it seemed a small matter to sacrifice one infant in ten thousand to save the life of one-tenth of the population. But any law rigidly enforced works more or less injustice. With more perfect knowledge it is

discovered that vaccination is not the only method of effective resistance to small-pox. It is discovered also that dangers from vaccination are greater in some families or in some cases than in others. The question, then, is fairly raised whether the State is justified in a rigid, inflexible enforcement of the rule for vaccination. It may quite conceivably happen that vaccination would not be permitted in certain exceptional cases where the patient is peculiarly liable to suffer injury. Every increase in knowledge makes a demand for a modification of the law. Ideal justice is approached when the people have become so trained that without any compulsion they will regulate their conduct in accord with the most perfect rules known at the time. Sanitary rules are enforced by an enlightened public opinion. Without such support effective sanitation is impossible.

(2) Laws to promote education and health, and moral and physical well-being fill a larger and larger place in the modern democratic State. The other growing department of law pertains to industrial coöperation. This is not new. At a time when the States were first building, the people were bound together by common ownership of land and by guilds and industrial corporations in towns and cities. Their laws were rules of their own adopting. The State did not inflict upon them pains and penalties, but rendered timely assistance in securing the willing observance of their own rules. This method of State-building was arrested by

the growth of despotic governments. The democratic State reverts to the ancient methods under new conditions. Like the free city of the Middle Ages, the modern democratic city is a business corporation. The citizen drinks the city water. He reads a book from the city library by a light furnished by the city. He rides upon a street-car owned and run by the city. He washes his clothes in a city laundry and cleanses his skin at the city bath. These are all the creations of law, yet to enforce such laws makes but a slight demand upon jailor or hangman. Such laws are enforced by the free will of the people who make them. The city government is made strong and pure and just through these many industrialties. In like manner the State at large is strengthened through the postal system and through the public telegraph, and there is good reason to believe that a public railway system administered by the democratic State will have a like result, purifying the politics of the State and rendering the government stronger and more just. The enforcement of all such laws makes little demand for special sanctions. At every step the law results from a discovery of a better way, a higher good. Such a law is enforced as a matter of course, by common consent, by public opinion, by the approval or the disapproval of the bulk of the community.[3]

SUPPLEMENTARY READING

CHAPTER IV

Sanitary Laws, and Laws to Promote Industrial Coöperation

[1] **Public Opinion.** — This is rather an unfortunate name for the great force by which men are constrained to conform for the most part to social requirements. As a matter of fact, opinions do not in themselves restrain men any more than laws do. The restraining force is not to be found in mere rules, whether formulated as laws or diffused as opinions, but in the penalties attached to their violation. The penalties at the disposal of government are usually definite and conspicuous and we are in no danger of overlooking them, but those inflicted by society in its natural or unofficial capacity, though quite as real and often more terrible, are intangible and easily overlooked. It is these penalties which chiefly concern us rather than the opinion which determines their allotment, but as the opinion in this case is the more conspicuous half of the transaction, it has given the name to the whole.

The penalties attached to repressive public opinion are mostly of the nature of restriction of social privilege. In the condition of dependence in which we now are, an exclusion from the ordinary privileges of society may easily entail the greatest hardship, leading in extreme cases, as we have seen, to elimination of the offender. More often, however, the hardship is merely an admonition which prevents the commission of the offense. Beginning with the extreme cases, the lack of certain highly artificial accomplishments or somewhat arbitrarily prized characteristics will prevent a person from entering certain carefully guarded social circles reputed to be specially "select." Such circles may have very little connection with society as a whole, may even be a menace to its stability and growth, but they illustrate the principle by which all social groups maintain their integrity.

Coming to accomplishments and characteristics of a more general character it is apparent that any serious lack will exclude a person from certain employments. Offensive manners or uncongenial temper will disqualify a person for those social and industrial functions which bring him much in contact with other persons, especially those of equal or superior rank. Such persons easily make their dissatisfaction manifest in subtle but extremely uncomfortable ways, and this discomfort together with the danger of exclusion from the function altogether, puts the utmost restraint upon vagrant impulses and constrains us to submit to most uncongenial requirements.

Coming down to cases more fundamental still, we encounter requirements upon which society insists with the utmost positiveness and surrounds with the awful sanctions of morality. The penalties here inflicted are so stern and so obvious that they recall the judgments of a solemn tribunal, and the rules which they are invoked to enforce, are known by a sort of metaphor as the moral law. This law is a changing one like any other, adapting itself to changing conditions. It differs from the cases we have just considered only in its greater importance and the corresponding rigor with which it is enforced, and it therefore has no definable boundaries. Morals are simply a species of manners about which society is very much in earnest, because it has very much at stake in these connections.

The penalties for immoral conduct are exceedingly difficult to define, but they probably include the most terrible chastisements which society ever inflicts. As the inquisitors in former days hunted for the most sensitive points in the human body in order to there apply their tortures most effectively, so society in the interest of its awful discipline has discovered that the sensitiveness of men to the opinion and affection of their fellows, is the point in which they can be most wounded and hence more easily coerced. To the modern man gibbets or rocks are not the great deterrent, but signs of distrust, dislike and disdain, and these signs are formulated and systematized by society into an engine of almost incredible efficiency.

The superiority of moral forces to legal penalties lies largely in their greater elasticity. As an organized body of social in-

stincts the moral law does not easily degenerate into literalism and formality. There is in a sense a revision of law for every case, an unconscious return to first principles and a judgment of each case on its individual merits. And despite the greater effectiveness of moral agencies they are less likely to put an interdict on individual freedom than civil laws. The man who believes that social judgments are wrong and who is earnest enough to be willing to stand the social frown, confident in the righteousness of his cause, can live out his conviction and thus make his protest against social misjudgments in the most effective manner. The maximum of constraint is thus combined with the liberty that is necessary for innovation and growth. Public opinion, with its accompanying penalties, is the great agent in social control. — *"Sociology," by H. H. Powers, 717, 718.*

[2] **The Vaccination Act of 1898.** — I am aware that I have only touched the fringe of a most interesting subject. The view of the Commissioners and of the majority of the speakers who supported the action of the government in both houses of Parliament was that there would be more vaccination if there were less compulsion, and that every time a father who conscientiously objected to the vaccination of his children was imprisoned, bullied by the magistrates, or fined, a new group of persons became interested in the subject and joined the ranks of those who ceased to make an Athanasian creed of the value of vaccination.

I think there is much to show that they were right in their anticipations. Mr. Chaplin said, in reply to a question in the House of Commons on February 9, that two hundred and thirty-nine thousand children had been exempted from vaccination under the new act; but before that act came into operation the estimated number who were withheld from vaccination in the same year was three hundred and seventy thousand; that at the moment he was speaking the vaccination trade was very brisk, and the demands for the glycerinated calf-lymph strained the resources of the department to keep pace with them.

There is, however, one way in which the administration of the law has been out of harmony with the good sense of the Commissioners, the department, and the House of Commons. All of

these have shown a praiseworthy desire not to make martyrs of the parents who object to the vaccination of their children; but their excellent intentions have been to a certain extent thwarted by the magistrates who have had to administer the new act.

Many of these have not thought it inconsistent with the dignity of their position as representing the just administration of the law, to grin and jibe at the parents who come before them to ask for the exemption certificate which the law authorizes them to demand. I am not an anti-vaccinator; that is, I believe that vaccination generally gives protection long enough, at any rate, to carry one safely through an epidemic; but I have been nearer to being an anti-vaccinator than I ever was before, since I have seen that the cause of vaccination appears to require magistrates, in the course of the discharge of their duties, to insult and endeavor to perplex the poor and ignorant who appear before them to claim exemption. — *Millicent Grant Fawcett, in "Contemporary Review," March, 1899.*

Industrial Coöperation. — During the past seven years the American people in cities have been investing something like $5,000,000 a year in public utilities. Some utilities they have bought. Some they have built. But in either case they have taken business that was private and made it public. The movement toward municipal ownership is strong, definite, unwavering. It has been growing steadily since the first year of the new century. But it is only important in view of whatever honesty and integrity it has shown in the public judgment. Therefore we may ask: How has the transfer of business been conducted? Has anyone been wronged? Have injustices to the former owners been done? Is it not a most remarkable testimony to the sense of justice and innate decency of the people of American cities that, in all this municipal trading, no one has been reported as having been seriously injured? * * * The people living in American cities have a billion and a third of debts. These debts represent largely their industrial activities. They represent subways constructed, lighting plants bought, docks and wharves acquired, parks laid out upon confiscated ground, schools established, market places located, hospitals built, equipped and operated, playgrounds and farms for boys and girls maintained,

sewers and garbage desiccating plants constructed, waterworks and heat and power plants taken over or erected. Surely, if the democracy were unfair, someone would organize the complaint against its business methods.

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In considering this problem of public service, it is important to bear well in mind this fact: that these public service corporations that are bones of contention in our cities, first of all serve our homes. Light, water, heat, and transportation are home comforts. Moreover, they are no longer luxuries for the rich; they are more diffused among us than are the comforts of the well-to-do. Light, heat, water, and transportation are the necessities of all the people, as society is organized today. Combined, these utilities are the footing stones of the foundation of the creature needs of a civilized home in every American city — large or small. They are labor savers, and hence industrial emancipators of women. A penny increase in the price of any of these utilities, or any variance from good service, is a serious matter in the household economy of the people. And we Americans are home dwellers before we are anything else. It is absurd to say that elements so intimate and vital in the happiness and efficiency of the home — our most important institution — shall not be entirely under our own direction and control, even if that direction and control involve ownership. — "*The Old Order Changeth,*" *by William Allen White, pp. 118-127.*

CHAPTER V

THE PERSISTENCE OF DESPOTIC NOTIONS

BECAUSE force is still used in all democratic States, and because so far as appears there will always be some use of force in the execution of the will of the State, there is an inveterate tendency to revert to the despotic notion that the State is, after all, founded upon force. It requires force to lift the infant to its base of supplies, and if this force were not habitually and continuously exercised the State would soon cease to exist. If this is what is meant by founding the State on force, surely there can be no dispute. The State cannot exist unless the physical conditions are fulfilled by the attainment of live, flesh and blood citizens. So much, however, ought to be assumed. The force then exerted in nourishing the infant explains nothing which needs explaining. But the sentiment which prompts the mother to lift the infant to her breast is a fact of a very different order. The sentiment does explain things which need explanation. The force is a mere mechanical adjunct to the sentiment and explains nothing. The sentiment which links together mother and child is a primary state-builder of the first importance. The State is founded upon family affections. These affections become generalized

and extended so as to include the kinsfolk, the village, the tribe, the nation, the human race, and upon these affections and sentiments the true State is founded. A passage from Bentham may serve to illustrate the length to which the philosopsy of despotism may be carried in its attempt to account for the family.[1]

(1) In the family, wherever force is employed to preserve its members from destruction, or to discipline its members into a more rational appreciation of family life and purpose, force itself becomes a factor in true state-building. But where force is employed to establish in the family the relation of sovereign and subject it tends directly to destroy the family. So in the tribe, force that is employed as a disciplinary agency in the attainment of a more perfect appreciation of tribal life strengthens the tribe.

Force used to establish or maintain the relation of sovereign and subject tends to destroy the tribe. We have seen that both in Asia and in Europe, where the laws had drifted into the hands of a despotic sovereign and were imposed upon an unwilling people by pains and penalties, the destruction of the State began. The French State was already well nigh destroyed when its Grand Monarch could say, "I am the State." It took thousands of years to build the French State. It was brought to ruin by three or four despots. The French State can live again only as reason and conscience are placed above force and fraud. In any society of rational beings so soon as its members come to look upon

Homes of the Mighty

ROYAL PALACE, BRUSSELS, BELGIUM

force as an ultimate sanction in the enforcement of its rules, that society is on its way to ruin.

(2) I admit that it is misleading to compare a voluntary society with the State as to the extreme limits of the use of force. The State is not limited in this regard as is the mere voluntary society. But it is not unfair to compare the democratic State with a voluntary society as to natural tendencies in the methods of enforcing rules. The Masonic Order does succeed to a remarkable degree in securing compliance with its rules by appeal to a common sentiment; while a prevailing belief that obedience was forced would result in disintegration; just as, in a State, an obedience that is enforced is no obedience at all, but is a mere temporary adjustment of conduct to avoid a penalty. Such a motive adds no strength to the State. Some modern writers, who seem to be dissatisfied with the language of the ancient Hindus when they asserted dogmatically that punishments governed singing angels in heaven, and who at the same time observe that the exercise of force has passed out of sight in the modern democracy, nevertheless assert with all the fervor of the ancient Hindu that the force exists in even greater amount than ever, and that is because there is so much of it that there is no need of showing it except upon rare occasions.

(3) An oft quoted passage of Sir J. F. Stephen vividly expresses this sentiment. He compares the Scotland of the fourteenth century with the Scotland

of to-day, and he dogmatically asserts that there is more force in the Scotland of to-day than there was in Scotland when every man lived in constant expectation of killing someone or being killed. He says: "The force which goes to govern the Scotland of these days is to the force employed for the same purpose in the fourteenth century, what the force of a line of battleships is to the force of an individual prize-fighter. . . . Force not only reigns, but in most matters it reigns without dispute."[2] Now is it true that force reigns in Scotland? I had supposed that during the last five hundred years morality, and conscience, and public opinion, and religion had been gradually substituted for force. Stephen, I know, calls this notion false, "not to say childish," yet I must still hold to the notion that the Scotch banking system, which is the admiration of the world, has grown out of the moral qualities of the people. He who believes that force rules in this system ought to be able to explain how force could be exercised without destroying its essential characteristics. So in the Scottish school system, how could force be exercised without destroying all that is best in the system? And in the police, every increase in the exercise of force is a step in the direction of barbarism.

But the eminent jurist asserts that force reigns even though it is not exercised. This is pure dogmatism. Another may say that force does not reign. But really this is a question to be settled by evidence. Take the

next normal, unspoiled Scotsman you meet and ask him whether he is a thief. If he is not, ask him why he is not. Ask him if he knows Scotsmen who are thieves. "Are thieves always punished in Scotland?" "No; it is considered such a disgrace to be a thief that a good deal of stealing is allowed to go on without the culprit being even exposed to the punishment of publicity." "Why does a Scotsman object to being sent to jail?" "It is chiefly on account of the disgrace of the thing. He loses the good opinion of his fellows." Scottish laws forbid the ordinary fist fight. Yet an occasional fight occurs, and no one is punished. The practice, however, gradually disappears, because it becomes offensive to public taste. It is simply not true, as any one may learn who will look deep enough into the subject, that the Scottish people lead an orderly and decent life because there is an unlimited quantity of brute force ready to be turned loose upon them. No such force exists. If the people could be induced to actually believe that they were governed by force, they would rapidly return to barbarism.[3]

SUPPLEMENTARY READING

CHAPTER V

The Persistence of Despotic Notions

[1] **Principles of Morals and Legislation.** — Two persons, who by any means stand engaged to live together, can never live together long, but one of them will choose that some act or other should be done which the other will choose should not be done. When this is the case, how is the competition to be decided? Laying aside generosity and good breeding, which are the tardy and uncertain fruits of long-established laws, it is evident that there can be no certain means of deciding it but by physical power, which, indeed, is the very means by which family as well as other competitions must have been decided, long before any such office as that of legislator had existence. This, then, being the order of things which the legislator finds established by nature, how should he do better than to acquiesce in it? . . . As between parent and child, the necessity there is of a power on the part of the parent, for the preservation of the child supersedes all further reasoning. As between man and wife, that necessity does not subsist. The only reason that applies to this case is the necessity of putting an end to competition. The man would have the meat roasted, the woman boiled. Shall they both fast till the judge comes in to dress it for them? The woman would have the child dressed in green; the man, in blue; shall the child be naked till the judge comes in to clothe it? This affords a reason for giving a power to one or other of the parties, but it affords room for giving power to one rather than the other. How, then, shall the legislator determine? . . . Looking around him, he finds almost everywhere the male the stronger of the two; and, therefore, possessing already, by purely physical means, that power which he is thinking of bestowing on one of them by

means of law.—*Bentham, "Principles of Morals and Legislation," p. 259.*

[NOTE. — This passage from Bentham well illustrates the extent to which the philosophy of despotism may be carried in accounting for the family. But it involves a denial of history, because in primitive society the woman is often the head of the family, and there can be no rational claim that the woman ever ruled by brute force. Not until slavery and despotism have been thoroughly developed has there been legal recognition of the man as the despotic ruler of the family. It involves a denial of reason and common observation, because with all the refinements of the philosophy of the war-club no way has been devised for settling the burning question as to how to cook the family meat by a sheer act of force, without violating the law or destroying the family.]

[2] **Social Control.** — The constituency of society being once determined, there remains the problem of control. How shall the people thus brought together be induced to do the things necessary for society? For it is plain, that, however well selected they may be, they will be only imperfectly adapted to their function. The problem of social control is distinct from that of education and that of selection. The least adapted are eliminated, the partially adapted are educated, that is, artificially adapted to social conditions as far as may be. But everybody knows that in every society a great deal of unadaptation remains that is not eliminated by either process. There are persons whom we cannot kill or imprison who are after all very poor citizens and very evil disposed. And there are some social obligations to which almost all of us render only an unwilling and perfunctory allegiance. Taken altogether, every society has to struggle with a vast amount of unruliness, about all it can manage, in fact, for this is always the limit of social development. How does it enforce its will? The first suggestion is always civil government, law and penalty. This is the most obvious form of social control, but not the most effective or necessary. The essence of government is originally always a person with personal assertion, who enforces his will by personal force, direct or indirect. Slowly there grow up certain traditions or habits of action on the part of the ruler and

these bind him in turn. These become the hereditary property of the society and protect it from the caprice of its ruler. Ultimately they harden into laws, and finally as society becomes more conscious of its needs and changes, it develops conscious ways of making and mending laws which vastly increase its efficiency. But the character of government in one respect never changes. It is the rule of force, and is commissioned to coerce those who will not otherwise obey. Incidentally the will of society as expressed in law is something of an educator, a guide even to the well disposed, but is a most imperfect guide. The discussions attending law-making are likewise educative, but we can make no greater mistake than to confound society with the State and imagine that law is the limit of our obligations. While the American people need peculiarly to emphasize respect for law, they need equally and in this very connection, to realize its limitations. A great deal of the contempt for law which is so manifest among us is due to the disregard of these natural limitations on the part of law-Makers.

It inheres in the nature of law that it can restrain only those acts which are disapproved by a large majority of society and regarded as an infringement on their rights. Inasmuch as the progress of society has always depended in a large measure upon the initiative and the liberty of individual citizens, there is a very strong feeling in all progressive and live societies that the liberty of citizens should not be interfered with for trifling reasons. In such societies there is always a wholesome dread of overmuch law, and any attempt to coerce persons in matters of moderate importance or of doubtful opinion is sure to rally around the law breaker an amount of sympathy which makes it dangerous if not impossible to punish him.

This is further complicated by the fact that law can be applied only to those cases where the offense can be clearly defined in nature and clearly observed in fact. Where the definition of the offense is elastic the inclinations of the judge or the jury will be so capricious, or so often at variance with the capricious judgment of society, that sympathy is easily forfeited and that schism between tribunal and people is produced which is so dangerous to the successful working of law. The same is true when the of-

fense, though easily defined is not easily observed, and can only be proved by indirect or circumstantial evidence. The element of caprice and divided opinion, so destructive to the efficiency of law, now comes in, not in the definition of the offense, but in the definition of evidence. In all such cases it seems to be the instinct of society to give the accused the benefit of the doubt.

This fear of government is enhanced by the almost universal experience that men chosen to perform its functions cannot be relied upon to act with singleness of purpose in the interest of society. There are many noble exceptions, and as soon as their exceptional nature is recognized, the increased confidence of men in their action becomes apparent, but it is to be feared that such men are still the exception.—*"Sociology," by H. H. Powers, pp. 715-716.*

[3] **Force.**—The first impression on comparing this spirited picture with the Scotland which we all know — the Scotland of quiet industry, farming, commerce, and amusement — is that the fourteenth century was entirely subject to the law of force, and that Scotland in the nineteenth century has ceased to be the theater of force at all.

Look a little deeper and this impression is as false, not to say as childish, as the supposition that a clumsy row boat, manned by a quarrelsome crew, who can neither keep time with their oars nor resist the temptation to fight among themselves, displays force, and that an ocean steamer which will carry a townful of people to the end of the earth at the rate of three hundred miles a day so smoothly that during the greater part of the time they are unconscious of any motion or effort whatever, displays none.

The force which governs the Scotland of these days is to the force employed for the same purpose in the fourteenth century, what the force of a line-of-battle ship is to the force of an individual prize-fighter.

The reason why it works so quietly is that no one doubts either its existence or its direction, or its crushing superiority to any individual resistance which could be offered to it. . . . Force not only reigns, but in most matters it reigns without dispute.—*Stephen, "Liberty, Equality and Fraternity," p. 227.*

CHAPTER VI

ONE LAW AND ONE LAWGIVER

IT IS conceded that an infant must be dealt with on the basis of force. So far as the infant is wholly without reason the rule of force is complete, yet such an one is wholly without law. The infant is dealt with under a régime of external guidance and direction until the age of mature judgment is reached. In most States this age is artificially fixed at twenty-one; at which time, in a democratic State, there is an assumption of the responsibilities of the guiding and directing body politic. It is conceded also that an insane man is dealt with on the basis of force. If he is wholly void of reason, force alone prevails; but such an one is not under law. As reason is restored the recognition of law and orderly conduct takes the place of force. Again, in dealing with the defective, the unsocial and the lawless, force is employed. If one is altogether lawless he may be wholly subject to force. But, as the term is used in a democratic State, the lawless man is not under law; he is under force. In all primitive society, in the exercise of all those powers which make for the building of the State, there is just one thing to be done with the lawless man. That is, he is to be destroyed, and destruction is a confession of

the failure of the law. When the Hebrew father found that his son was wholly lawless, he had not the liberty of the Roman father to destroy his child. Custom and the law of the land required that he call upon his neighbors, and that they together destroy the lawless son. Such an act was a public confession of the failure of the law of the family. Only those are perfectly subject to the law of the family who are lovers of fit and orderly conduct, and these have no fear of being destroyed for lawlessness. It has taken the world a long time to learn that fear of punishment does not tend to make lawful members of society. For thousands of years the belief prevailed that the rod on the child's back made it easier for the child to remember dates. We now understand that our ancestors retained intellectual powers in spite of the rod, not because of it. We may still retain the rod as a minor disciplinary agency, but we are no longer under the delusion that corporal punishment in itself has a tendency to clarify the intellect.

(1) In the primitive State a familiar form of the death penalty was banishment. Instead of actually taking the life of the culprit, the State declared him an *outlaw*. Nothing could more vividly portray the idea of law upon which all States were founded. Those only were subject to the law who freely and of their own motion obeyed the law. When the State banished a member it was an artificial, or a public, recognition of an already accomplished fact. The

member had ceased to be subject to the law, and the State withdrew fellowship. This notion of law has everywhere prevailed until the advent of despotic government. The despotic notion of law has tended everywhere to reduce the masses of the people to the condition of chattel slaves or to mere helpless victims of hunger and brute force.

(2) The democratic notion of law is well illustrated by international law. From the despotic standpoint this is not law at all; it lacks the sharp distinction between sovereign and subject which the despotic State assumes.[1] International law is an application of those principles of conduct which in all lands have tended to preserve and develop the democratic State. There has always been international conduct of some sort. As States have grown into self-consciousness some international conduct has been recognized as fit and orderly and other conduct as unfit and disorderly. With the growth of that moral sense which has created the modern State there has arisen a strong disposition to approve the fit, and to disapprove the unfit in international conduct. Under this sanction a large body of rules has come to be universally observed by many of the leading States. The particular States observing these rules are within the pale of international law; the others are in the position of outlaws.[2] International law prevails only among those nations freely observing the law. Other States are dealt with upon a different basis. Among the States subject to international law

there arise disputes as to the application of the law. In such a case the States follow the old and the beaten track. They try to argue it out, or they appeal to witnesses, or, after the manner of the primitive Roman court, they resort to the friendly and impartial neighbor. That is, they constitute a court of arbitration. Or they may resort to the barbarous practice of trial by battle. Just as in the democratic State, the ultimate sanction in international law is the approval or disapproval of the bulk of the members of the society of nations. Law among the nations is imperiled just as is law within the State by the growth of despotic notions of government. A government of a particular State which is engaged in the process of substituting force for law in the State will naturally tend to play the tyrant among the nations.

(3) For all the relations of life there is one fundamental principle of right conduct. It is the same in the family, the village, the tribe, the State, the human race. There is one law and one ultimate sanction of law. The law has received the name of Love, and the ultimate sanction is the unspoiled and unperverted conscience. In an imperfect world the law is known only in part. Progress is attained through the discovery and application of the principles of the law. The word love, or any word which may be chosen to designate and summarize ultimate moral law, is a word which cannot be defined. It cannot be defined except in a negative way, because it stands for that which is con-

fessedly unattained. The law will be known when the righteous State has been attained. It cannot be known before. It is the conscious striving for an unrealized moral order which differentiates the moral being. The belief in a power that works for righteousness is the essence of all religion. Among the latest words of Herbert Spencer is the statement that the conception to which the expositor of the universe tends "is much less to that of a universe of dead matter than that of a universe everywhere alive." He further states that "the necessity we are under to think of the external energy in the terms of internal energy gives rather a spiritualistic than a materialistic aspect to the universe." If we conceive of the universe as alive and as spirit, then all law is moral, and what we call force in external phenomena is a subordinate moral agency. Lawlessness results from the attempt to substitute the appearance for the higher reality. The universe and the master organism called the State each appear to rest on force. Yet such a belief involves relentless war as cruel as the grave. There is universal moral order when all things are seen to work together for the highest moral ends. There can be no fair trial of democracy until there arises a universal belief in democracy. There can be no belief in democracy by a people who retain the despotic notion of sovereignty and the despotic notion that force is the ultimate sanction of law. Men cannot be forced to believe in democracy. One of the most insidious enemies to democracy is the

notion that the teaching of despotism is dangerous. The democrat must freely consent to the teaching of all despotic doctrines which are honestly held. But he is only half a democrat who is willing to tolerate the teaching of opposing beliefs. The real democrat is more than a mere tolerationist. He insists positively upon the free and unforced expression of opinions and beliefs. Democracy assumes that political wisdom is attained by the unforced exercise of reason and conscience. Every act of repression tends to vitiate the result. So long as men believe in despotic government, the democrat must permit the doctrines of despotism to be freely taught and fairly stated. Freedom of teaching in a democracy is not a thing to be tolerated; it is to be positively and aggressively insisted upon.

SUPPLEMENTARY READING

CHAPTER VI

One Law and One Lawgiver

[1] **International Law.** — International law consists in certain rules of conduct which modern civilized states regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.

Two principal views may be held as to the nature and origin of those rules. They may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered; or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them. According to the former view, a distinction is to be drawn between international and international positive law; the one being the logical application of the principles of right to international relations, and furnishing the rules by which states ought to be guided; the other consisting in the concrete rules actually in use, and possessing authority so far only as they are not in disagreement with international right. According to the latter view, the existing rules are the sole standard of conduct in law in present authority; and changes and improvements in those rules can only be effected through the same means by which they were originally formed, namely, by growth in harmony with changes in the sentiments and external conditions of the body of the states. As between these two views in their crude form the majority of writers appear to hold to the former, but a considerable number, while thinking that positive international law derives its force

from absolute right, practically refer to positive law as the only evidence of what is right; so that international usage and the facts of the modern state life return by a byroad to the position which they occupy in the second view, and from which they appear at first sight to have been expelled. . . . The difference of opinion thus shown is no doubt not greater than that which exists as to the principles by which the internal life of a state ought to be regulated, and as to their origin and sanction of the principles.—"*A Treatise on International Law," by William Edward Hall, pp. 1, 2.*

[2] **Actual Positive International Law.**— Coming within narrower limits, we define international law to be the aggregate of the rules which Christian States acknowledge as obligatory in their relations to each other, and to each other's subjects. The rules also upon which they unite as in treaties to impose on their subjects, respectively, for the treatment of one another, are included here, as being in the end rules of action for the States themselves. Here notice:

1. That as Christian States are now controllers of opinion among men, their views of law have begun to spread beyond the bounds of Christendom, as into Turkey, China and Japan.

2. The definition cannot justly be widened to include the law which governs Christian States in their intercourse with savage or half-civilized tribes; or even with nations on a higher level, but lying outside of their forms of civilization. In general, towards such nations, they have acted on the principle that there is no common bond of obligation between them and the other parties, observing only so much of international law as suited their policy or sense of right at the time. Especially towards savage tribes they have often acted with flagrant selfishness, as if they feared no retribution from a weaker party, or were beyond the reach of public opinion. (Comp. § 143 and § 223).

3. The rules of action agreed upon by two or more Christian States, but not by all, or the most of them, form no part of international law; although they often illustrate it, and often pave the way for the admission of new modifications of it.

4. Nations, it is conceded by all; have obligations toward for-

eigners who are not constituent parts of any nation, or, at least, of any nation by which the law of nations is acknowledged. The consideration of the rights or moral claims of such persons belongs to international law, not as the system of rules observed between nations, but as involving obligations which all nations, or all Christian nations, acknowledge.

The way in which positive international law becomes such shows that it must be progressive and somewhat uncertain. Right, as Heffter remarks, is either *guaranteed,* under the protection and force of a competent power (as we see it in the state), or *free,* that is, the individual power or person must protect and preserve it for himself. The law of nations is of this latter kind. First of all, the single state sets up for itself its views of right against other states. If it gives up its isolation, it freely forms an intercourse with other states, a common right or law, from which now it can no longer set itself free.—*"International Law," by Theodore Woolsey, pp. 3-5.*

QUESTIONS FOR REVIEW. PART XI

1. What is law in a despotism? Can rewards be reckoned among the sanctions of law in a despotism? How does law in a State resemble a law of nature? In the origin of law in Europe and Asia were there specific sanctions? How were punishments brought in? How was obedience secured before punishments were introduced?

2. What are three meanings of the word law in English history? Is it possible to read history correctly and at the same time attach an unvarying meaning to terms in common use? Why did the English people cherish their early laws? What are the two prevailing contradictory notions of law?

3. What is the ultimate sanction of law in a democracy? In a democracy, may rewards be accepted as a sanction of law? How are the school laws enforced? Are there features of the school law which call for the application of force? Why, then, does not this whole law rest on force? Why must force prevail in a despotism in matters of education?

4. How are laws for the prevention of small-pox enforced? Why did the English people refuse to obey the law for the enforcement of infant vaccination? Why is the law more generally observed when made

less compulsory? Can there be effective sanitation without enlightened public opinion? How are the laws for supplying the industrial needs of a city enforced?

5. Is the family founded on force or on affection? Does the true state involve a wholly new principle? What is the function of force in the family and in the State? How was the French State destroyed? How does the State differ from a voluntary society in the use of force? Is there as much force in the government of Scotland to-day as there was five centuries ago? Can men be governed by a force that is not exercised?

6. So long as the infant is wholly under force, is he at the same time under law? If the insane man is wholly subject to force, is he at the same time subject to law? Is the man who is wholly lawless at the same time subject to the law? What did the primitive State do with the lawless? What does the term outlaw mean? What is international law? Is it law in the despotic sense? Is it law in the democratic sense? What are the sanctions of international law? Can there be two principles of right conduct? What name is given to the one principle of right conduct? Can ultimate law be understood in an imperfect state? Is it force or is it moral being that rules the universe? Can a belief in democracy be promoted by repression?

SUBJECTS FOR SPECIAL STUDY

1. Sanctions of law as taught by Austin.

2. Law without formal sanctions as described in Maine's "Ancient Law" and his work on "Early Law and Custom."

3. T. H. Green's "Ethics" on "Will, Not Force," as the basis of government.

4. Study the ordinary methods in the execution of school laws.

5. The growing field of state and municipal industrial coöperation.

6. Law as seen from the standpoint of international law.

PART XII

Democracy for the World

CHAPTER I

THE ISSUE BETWEEN DEMOCRACY AND DESPOTISM

IN THE perfect State there will be no conflict between the individual and organized society. The conscious weaknesses of each individual in certain lines will be supplemented by the comparative strength of other individuals in those lines. The large and increasing sphere for the individual will arise from the increasing consciousness of individual defects. The individual life cannot be lived except as it is supported and made perfect through the coöperation of the brotherhood. The State becomes the necessary and perpetual agency for the fulfillment and realization of the individual man. All who have ever consciously labored to found the State have aimed at some method of harmonizing the individual with the external organization of society. This is not true of those who have striven to found the despotic State, as well as those who have striven to establish the democratic State. According to the one, harmony is attained by the submission of the many to the will of the one, or to the

will of the few. According to the other, harmony is attained by the friendly coöperation of all in the interests of all.

(1) The conflict of the ages is not a conflict between theology and science. It is a conflict between the effort to attain the repose of society by imposing the will of the one upon the many, and the effort to attain just relations through brotherly coöperation. In pursuance of this conflict the freer and more liberty-loving moved to the west in Asia and in Europe. At Marathon, at Thermopylæ and at Salamis, the right of friendly coöperation confronted despotic power. Later, the Greeks themselves became despotic, and the State was ruined. The Romans by centuries of brotherly coöperation built up an invincible State. Later it became imperial, despotic, and then a victim of Goths and Vandals. In sea-girt Britannia and in the forests of Switzerland liberty again found a home, a field for slow and mature growth. With all the accumulated experiences of past ages; with the best the world has furnished in religion, law, philosophy, poetry, and art, the spirit and the institutions of liberty grew apace in England and Switzerland. Yet all the time liberty was neighbor to despotism. The conflict was never abated. History seemed to be repeating itself, and Christian Europe was fast becoming subject to oriental despotism. In the midst of the conflict the more daring spirits crossed the ocean to make a new stand for freedom on the vacant continent. It was

through the closest coöperation of the builders of the free State in America, and the defenders of liberty in Europe, that the democratic Christian State became clearly defined. They were American democrats who headed the agitation which gave to England a Commonwealth in the middle of the seventeenth century. By the continued coöperation of Europeans and Americans the idea of the democratic State was kept alive. By the encouragement of English statesmen and by the help of liberty-loving Frenchmen our revolutionary fathers accomplished the apparently impossible task of founding an independent free State in the New World. The triumph of democracy in the New World was an efficient cause of the French Revolution.

(2) The French Revolution and the Napoleonic Wars raised and established among the nations a definite, recognized issue between despotism and freedom. This issue has always existed. It has always entered into the conflict of nations, but it has ever been obscured or concealed by other motives — the sheer lust for power, the desire for plunder, pride, ambition. But after the Revolution there was a new Europe. That definite conflict, which had for centuries been kept alive in Switzerland and in England between despotic power and voluntary coöperation among the people, was extended to the whole of Christendom. The issue once raised and clearly defined can never grow less important or less insistent until the human race shall know for certain whether man is made for slavery

or for freedom. The Holy Alliance was formed by the leading monarchs of Europe to crush out all voluntary risings of the people against tyranny and to establish universal and unquestioning obedience to constituted authority. England, under the leadership of statesmen who inaugurated there a democratic revolution, met the Holy Alliance by direct opposition. America, encouraged by England, met the Holy Alliance by what is known as the policy of the Monroe Doctrine. On the side of the theory of despotic government Russia has always been the leading State. In favor of the theory of popular government England has taken the lead in Europe, and the United States has taken the lead in the New World. In Europe especially this issue has tended to color and to dominate the policy of all the States. It has tended to create a United States of Europe. The peoples of the various States are learning to keep step in the march towards freedom. About the year 1830 Europe was stirred by popular movements: notable and permanent advances were made in England, France and Switzerland. More notable still were the revolutions of 1848.

The last half of the last century was made memorable by the transformation of the whole of Europe into a huge military camp. This, for the most part, took place during a time of profound peace. The wars were few and brief, yet the preparation for war was persistent and of ever-increasing extent and completeness. As noted incidents to the formation of the

military camps, Germany and Italy were united. The reason assigned for the continued increase of military burdens on the part of the various States is the proximity of dangerous rivals. A real, though often a disguised reason, is the dread of popular uprisings. The goverments fear their own subjects, and hence they arm themselves against the people. Happily the progress of democracy is not dependent upon revolutions and popular uprisings. It is rather dependent upon the school, the university, the press, the platform, the pulpit, voluntary associations and many other peaceful agencies.[1] So, under the most despotic of the governments, democracy has constantly grown and become more formidable. With the diffusion of knowledge the people have everywhere become more responsive to the sufferings of their fellowmen. The Armenian massacres appealed mightily to the conscience of Europe, and the people will not soon forget the crime involved in the permission of such an easily prevented abomination.

In the New World, after the close of the Napoleonic wars, democracy grew apace until nineteen new republics had been formed with constitutions modeled after that of the United States, and the last crowned head departed from the land. Meanwhile the people have grown more sensitive to the cry of oppressed peoples. It is to this increased sensitiveness that we may attribute the war with Spain.

Homes of the Mighty

GRAND GALLERY, ROYAL PALACE, STOCKHOLM, SWEDEN

SUPPLEMENTARY READING

CHAPTER I

The Issue Between Democracy and Despotism

[1] **The Mainspring of Democracy.**— In this American nation, if the student of the times would go to the bottom of our institutions, he would find that we have changed and are changing the form and constitution of our state and national institutions. . . . And yet, in the face of these changes, the student of the times would find that we are conducting the public schools after the ancient ways. In the United States we spend nearly a half billion dollars every year for schools — mostly in direct taxes, and those direct taxes are levied by men elected by a direct vote of the people. It is primitive folk-rule; yet the sum we raise thus is the largest single item in the tax budget, direct or indirect, that we raise under the government. Moreover, it is the only fund in our system of government that is so carefully watched that dishonesty and extravagance do not waste it materially. The strongest instinct of this nation — one might almost call it an obsession — is the instinct for education. So as a people we have kept the common schools separate from the other branches of our various governments. Anarchy might wipe out our federal government, and in the disorder the state institutions might suspend; even the cities and counties might be paralyzed in the calamity. But in all the political upheaval the machinery of our public schools would not be affected seriously. The $475,000,000 school tax would be collected, the half million school teachers would go to work every morning, and the eighteen million students would keep on preparing themselves to resist whatever tyranny and oppression and injustice the political cataclysm about them might produce. The framers of the Constitution, with all their fine system of checks and balances, clearly overlooked the

mainspring of the whole mechanism of democracy, and left it unhampered. It is practically the only political institution which is not in some way subject to more or less complex control and interference by the State or the nation.

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If democracy is to go forward, it must begin to move in the schools of the country. Now, as a people we can move quickly when we desire to move quickly. Within ten years there has been a complete change in the American mind about the treatment of defective children. We have stopped putting children in jail; the juvenile court has come into the judicial system of practically every American state. We do not count its cost, because we see its justice. The enlightened selfishness of the American people makes them regard investments in playgrounds, children's camps, recreation places on docks and piers, boys' farms and similar institutions for children, as profitable investments.

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Laws will not make us a free people; presidents and governors will not make us free; courts will not make us free. "Ye shall know the truth, and the truth shall make you free."—*"The Old Order Changeth," by William Allen White, pp. 170-194.*

CHAPTER II

TWO METHODS OF AIDING OPPRESSED PEOPLES

THERE are two radically different ways of aiding oppressed peoples. Switzerland has for generations given aid to the oppressed, through the kindergarten, through Christian education, through the example of free government, through the sentiment of freedom which breathes through all its literature and through all its history. Switzerland is, in natural resources, one of the poorest of countries. Its people are, nevertheless, comparatively well-to-do on account of their free institutions, on account of their spirit of brotherly coöperation. Switzerland has no fleet; it maintains no standing army. It is not able to create a fleet; it is not rich enough to support a standing army. Only by example, only through the use of spiritual weapons is it possible for Switzerland to carry the hope of liberty to remote peoples. England, on the other hand, represents an entirely different policy. Long before the ruling classes in England had come to have any sympathy with democracy there had been established an imperial policy. England had entered into competition with other nations for the control of so much of the earth as it was possible to lay hands upon. Moreover, when democracy was finally developed in

England it was early identified with freedom of contract and the free, open market both at home and abroad. By the middle of the last century democracy and free trade had come to be in England almost interchangeable terms. Richard Cobden and John Bright saw the world entering upon a millennium of democracy and free trade. All the nations would disarm. By means of the free competitive markets, habits of Christian coöperation would be established. By means of commerce the whole human race would be rapidly trained to habits of freedom and local self-government. The English free-traders opposed the imperial policy. They would have every English colony become independent and self-governing. Some of them would even withdraw from India and surrender every outlying possession. Their doctrines have fastened upon them the name "Little Englanders." England has adopted free trade, while at the same time she has continued and extended the policy of imperialism. She has enlarged her army and navy. She has extended her dominions in all lands. Spain has failed in her imperial policy because of oppression. The imperial policy of England and Holland succeeds because of the spirit of liberty and fair dealing which pervades the administrations. More than a hundred years ago Warren Hastings was impeached and branded as a tyrant because of his treatment of native Indians,[1] while in India his name is still venerated as the founder of a new and better order. England is the one great

nation which is bringing hope and courage and aid to the oppressed peoples in many lands by the use of armies and navies.

After our Civil war America was at liberty to adopt either the Swiss or the English method of laboring for the oppressed. We set to the nations a truly heroic example of disarmament. Within a few months after the greatest war of the half-century, we were without a standing army and without a navy. We might have taken a position that we would have no army and navy.[8] We might have determined to extend the principles of liberty only by example, by means of the teacher and the preacher. But the United States was not, like Switzerland, a poor country. For us to really follow the example of Switzerland in this regard would be to devote the surplus wealth, which would otherwise go to the support of army and navy, to the maintenance of the kindergarten, the school and the church in every land upon the face of the earth. This policy would also have been quite in harmony with the teachings of the English free-traders. Before the war America was rapidly adopting a policy of free trade. The American protectionists had always intended to adopt a permanent policy of free trade after our industries had been diversified and developed. Before the Civil war the Republican party was largely a free trade party. But, as an incident to the war, taxes were laid without stint upon everything taxable. We taxed home producers, and we laid enormously high duties

upon imported goods. Immediately after the war, taxes were removed from the home products, but were allowed to remain upon imported goods. While the American voter was busied with reconstruction and the money question, a wholly new doctrine of protection was allowed to spring up. This new protective policy involved the building up of a permanent system of hostile tariffs against all nations. It involved also the continuous transfer of the property of one set of American producers into the hands of another set of producers. It involved continuous governmental aid and encouragement to the concentration of wealth and the building up of monopolies. The new protective policy involved the devotion of millions of money to the preaching of the doctrine of pure national selfishness; worse than that, it involved the preaching of the doctrine of jealousy and hatred towards other nations, and especially it involved the preaching of hatred towards England.[3]

SUPPLEMENTARY READING

CHAPTER II

Two Methods of Aiding Oppressed Peoples

[1] **Trial of Hastings.**— India owes to Pitts' triumph a form of government which remained unchanged to our own day. The India Bill which he carried in 1784 preserved in appearance the political and commercial powers of the Directors, while establishing a Board of Control, formed from members of the Privy Council, for the approval or annulling of their acts. Practically, however, the powers of the Board of Directors were absorbed by a secret committee of three elected members of that body, to whom all the more important administrative functions had been reserved by the bill, while those of the Board of Control were virtually exercised by its president. As the president was in effect a new Secretary of State for the Indian Department, and became an important member of each ministry, responsible like his fellow-members for his action to Parliament, the administration of India was thus made a part of the general system of the English government: while the secret committee supplied the experience of Indian affairs in which the Ministry might be deficient.

Meanwhile the new temper that was growing up in the English people told on the attitude of England towards its great dependency. Discussions over rival plans of Indian administration diffused a sense of national responsibility for its good government, and there was a general resolve that the security against injustice and misrule which was enjoyed by the poorest Englishman should be enjoyed by the poorest Hindu. This resolve expressed itself in the trial of Warren Hastings. Hastings returned from India at the close of the war with the hope of rewards as great as those of Clive. He had saved all that Clive had won.

He had laid the foundation of a vast empire in the East. He had shown rare powers of administration, and the foresight, courage, and temperance which mark the born ruler of men. But the wisdom and glory of his rule could not hide its terrible ruthlessness. He was charged with having sold for a vast sum the services of British troops to crush the free tribes of the Rohillas, with having wrung half a million by extortion from the Rajah of Benares, with having extorted by torture and starvation more than a million from the Princesses of Oudh.

He was accused of having kept his hold upon power by measures as unscrupulous, and with having murdered a native who opposed him, by an abuse of the forms of English law. On almost all these charges the cooler judgment of later inquirers has acquitted Warren Hastings of guilt. Personally there can be little doubt that he had done much to secure to the new subjects of Britain a just and peaceable government. What was hardest and most pitiless in his rule had been simply a carrying out of the system of administration which was native to India and which he found existing there.

But such a system was alien from the new humanity of Englishmen; and few dared to vindicate Hastings when Burke, in words of passionate earnestness, moved for his impeachment. The great trial lingered on for years, and in the long run Hastings secured an acquittal. But the end at which the impeachment aimed had really been won. The attention, the sympathy of Englishmen, had been drawn across distant seas to a race utterly strange to them; and the peasant of Cornwall or Cumberland had learned how to thrill at the suffering of a peasant of Bengal.

Even while the trial was going on a yet wider extension of English sympathy made itself felt.—*"A Short History of the English People," by J. R. Green, Vol. IV., pp. 1740, 1741.*

[2] **Disarmament.**— Devout Christians may deplore the use of force in the settlement of international differences, and in the procuring of the necessary elbow-room for the utilization of our gifts and powers as a nation. But our war with Spain, in 1898, and our joining in the suppression of the Boxer uprising, in 1900, have again demonstrated that the employment of brute

strength is still the only thing, in certain well-defined cases, to prevent greater evils. Carlyle, in one of his sarcastic moods, once spoke of the people of England as "mostly fools." With even greater justice, it is to be feared, that saying would hold true, when applied to mankind at large. And "fools," as we know, cannot be reasoned with; they must be coerced.

There is, however, no valid reason to suppose that we are on the way to becoming a soldier-ridden country. Our geographical position will mercifully save us from the curse of militarism. Indeed, our soldiers, while they have done much hard fighting with Moros and other irrational creatures in the Philippines, have been doing just as effective work in that island world in the matter of policing and practically instructing the natives in the elementary duties of citizenship. There, as well as in Cuba and Porto Rico, our army has been a highly valuable educational factor, and there is good ground for surmising that our regular armed force will continue to do similar work hereafter in other parts of the world.—*"America, Asia and the Pacific," by Wolf von Schierbrand, pp. 313-314.*

[8] **Antagonism Between England and America.**—The feeling of the English towards the Americans was much less marked. It was not hatred, but, rather, contemptuous dislike. Englishmen, not without reason, were inclined to think of their transatlantic kin as noisy, ill-mannered, vain, and boastful. They resented the diatribes launched against them; they objected to the aggressiveness of American policy, which so frequently came into collision with their own; and they detested the high commercial tariff in the United States, which they believed to be aimed at them especially, and to be a serious injury to their interests. It was hard for them to understand how any one could sin against the sacred doctrine of free trade except from malicious motives. All told, especially among the upper class, their opinion of the Yankees was far from flattering. So numerous indeed were the causes of antagonism between the two English-speaking peoples that it was easy to forget the influences which were in steady operation to bring them together.—*"The United States as a World Power," by Archibald Cary Coolidge, p. 235.*

CHAPTER III

THE TRUE AMERICAN POLICY

IT IS not necessary to recount here the many unforeseen results of our war with Spain. Years ago we began to follow a policy of acquiring harbors and coaling stations in distant regions. We now own harbors and coaling stations in the two oceans, and we have a possession in the Orient almost as large as Japan. It is no longer an open question whether the United States is to become a great and recognized naval power. This is already an accomplished fact. It is, however, an open question still, whether we are to adopt a policy of expansion and imperialism similar to that of England. Shall we enter upon a permanent policy of acquiring and ruling territories in every available portion of the globe, or shall we rid ourselves at the earliest possible moment of all the territory acquired as a result of the war with Spain, and confine ourselves to strictly adjacent continental expansion, or to no expansion at all? These are questions which demand an answer. They do not answer themselves. We have merely drifted into a policy of foreign conquest. The first and the really decisive step in this line was taken when we decided to create a formidable fleet. The step was taken, as it were, inadvertently,

without the people in general realizing what they were doing. The war with Spain simply served to reveal to us the natural conclusion of a policy then adopted. Really, the time for the anti-expansionists to grow excited and bring the question to an issue was years ago, when the creation of the fleet began. But the war put the issue for the first time into form for easy popular apprehension. Seldom has a people been confronted with a more important and far-reaching question. It deserved calm and deliberate treatment; yet so sudden was the onslaught and so important seemed the result that there was little room for calm debate.

Those opposed to the policy of expansion have felt that the nation without forethought or deliberation, was being committed to a policy of imperialism in violation of all former safe and conservative traditions. If anything were done to stem the tide of foreign conquest, it must be done soon. Especially must the United States be prevented from gaining a permanent foothold in the Orient.[1] The anti-expansionists did not actually encourage the natives of the islands to resist by force of arms the authority of the United States, but openly rejoiced in the fact that they did resist. They saw in Aguinaldo a second George Washington, and in his followers our revolutionary fathers. They compared our army of occupation to the armies of George III. They sought to persuade the American soldiers to refuse to fight the Filipinos. Some even proposed to stop the war at once by an "injunc-

tion." But this was not calm debate; it was a species of more or less justifiable hysteria. On the other hand, many of the supporters of the policy of expansion were equally disposed to settle the whole question by an appeal to sentiment. Let not the American flag ever be hauled down from a foot of soil over which it has ever waved. This is imperialism with a vengeance. If such a sentiment should become a ruling passion, Americans would rapidly degenerate into a nation of tyrants and slaves. In the main the policy of expansion has been supported by the mere opportunist argument — what else can be done?

We may reasonably think that the time for sober second thought has now arrived, and that upon the basis of the deliberate judgment of the nation our permanent foreign policy may be defined. There are certain broad general principles upon which all parties ought to agree.

(2) It should be conceded that we can no longer pursue a policy of isolation for the reasons assigned in Washington's Farewell Address. Washington commended isolation until such time as we should become masters of our own destiny. If Washington had meant that Americans who were the beneficiaries of countless ages of suffering in the Old World should settle down on the richest continent that God had made and should appropriate it all for their own selfish enjoyment, he would have been among the meanest of men. He neither said nor meant any such thing. It was for the

sake of the liberty-loving in all lands, as well as for the well-being of Americans, that he commended the avoidance of the intrigues of European politics.

It was quite in harmony with the spirit of the farewell address that President Monroe's message was prepared in 1823. America could for the time give most effective aid to true lovers of liberty in all lands by first preëmpting the whole of the New World for free institutions. In pursuance of the policy of the Monroe doctrine, the New World has been preëmpted for freedom, and in the meantime the world has grown small. A new industrial age has ensued. The world has become articulate by steam and electricity in a manner not dreamed of in 1823. It may still be true that our country should prolong a policy of isolation from the Old World, but such a policy cannot be justified for the old reasons. We are under the same old obligation to do all in our power to assist all people in their striving for light and liberty. Under the new and changed conditions it is fairly an open question whether this may not be better done by more direct participation in the politics of the Old World.[2]

(3) A hundred years ago alliances between the States of Europe meant almost continuous wars involving the leading nations in deadly conflict. Today there is much reason for believing that the "United States of Europe" means a method for avoiding war. Since the Holy Alliance of 1823 there have been few hostile encounters between leading European States. The

Crimean war is now looked upon as a blunder or a crime. The war between France and Germany is viewed with scarcely less favor. We see, then, the remarkable phenomenon of the European States supporting armies and navies beyond all former precedent along with a growing disposition to avoid hostile encounter. Surely Americans ought to agree upon a policy of continued disarmament. We ought to use the full weight of our power and influence in favor of the disarmament of Europe. We ought to use our best endeavors for the prevention of European wars. Whether we pursue a policy of isolation or whether we participate more directly in the diplomacy of the world, our general policy ought to be the same. Our aim should be the time-honored purpose of making an end of oppression and militarism.

SUPPLEMENTARY READING

CHAPTER III

The True American Policy

[1] **The Anti-imperialist Position.**— To the People of the United States: The full ratification of the treaty with Spain will cause a technical change in the relations of the United States to the Philippine Islands, but will afford no reason for any change of the views of the anti-imperialists in regard to the future of the islands, nor will it in the least affect the clear duty of this Republic.

We are now engaged in warfare with the inhabitants of those islands. It is unprofitable to discuss the question as to which party began hostilities. * * *

The evidence is very clear that Aguinaldo was brought to the islands by our own warship, that his aid was accepted and desired in our military operations against the Spaniards, and that hopes of independence were encouraged by our consuls and other officers; that a parliament of the islands, organized by representatives elected by one hundred and eighty-six towns and provinces, chose Aquinaldo president and framed a constitution, which was promulgated, defining the powers and duties of the separate departments of the government with remarkable clearness and ability, and that the government so formed fairly represented the intelligence of the people of the islands.

It is also undeniable that on January 5, President McKinley issued a proclamation, through General Otis, declaring that on the tenth of the previous month the Philippine Islands had been ceded to this country by Spain by the signature of the Treaty of Paris, and further ordered him to extend the military government of the United States "to the whole of the ceded territory," and to demand the surrender of Iloilo, which

was then held by the Filipinos in an orderly manner by capture from the Spaniards.

It cannot be claimed in law that this assumption of power was warranted in advance of the ratification of the treaty by both parties, and there can be no doubt that the arbitrary claim greatly aggravated the people of the islands, whose hope of independence seemed thus rudely destroyed. No declaratory resolution as to the future of the islands was assented to by the administration before the ratification of the treaty by the senate, and none has been made since.

Any right that we assert to ownership of the Philippines must rest, therefore, either upon conquest or upon purchase from their Spanish oppressors, or upon both; and in any case it is, as we believe, inconsistent with the principles of this Republic, and fraught with danger to its peace and to the peace of the world.

The first result we already witness — a war of subjugation, which must embitter the people we seek to rule, and which, however successful, must bring disaster and death to our soldiers, and unmeasured cost to our people.

Profoundly impressed with the seriousness of the situation, it is the purpose of the anti-imperialists to continue the circulation of literature; to assist in the formation of leagues, and by public meetings, and every proper means known to a free people to agitate for the revival in the land of the spirit of Washington and Lincoln; to protest against a spirit of militarism and force; to oppose the colonial idea and a permanently large standing army, and to assert the vital truths of the Declaration of Independence embodied in the Constitution and indissolubly connected with the welfare of this Republic.

They urge all lovers of freedom, without regard to party associations, to coöperate with them to the following ends:

First — That our government shall take immediate steps toward a suspension of hostilities in the Philippines and a conference with the Philippine leaders, with a view to preventing further bloodshed upon the basis of a recognition of their freedom and independence, as soon as proper guarantees can be had of order and protection to property.

Second — That the government of the United States shall tender an official assurance to the inhabitants of the Philippine Islands that they will encourage and assist in the organization of such a government in the islands as the people thereof shall prefer, and that upon its organization in stable manner the United States, in accordance with its traditional and prescriptive policy in such cases, will recognize the independence of the Philippines and its equality among nations, and gradually withdraw all military and naval forces.

GEORGE S. BOUTWELL,
and Twenty-nine Others.

[8] **The Policy of Isolation.**— We stand face to face with great and grave duties. We must not say, "We are well enough off; let others care for themselves." It is true of nations as it is of individuals, that "none liveth to himself, and none dieth to himself." We owe a duty to others. The law of altruism is binding upon nations as well as individuals. Humanity has claims upon us. Those who are struggling for liberty and a better civilization have claims upon us. God has given to America a great mission. That mission is to develop, under the eyes of the world, the highest type of civil liberty and spiritual Christianity. As we are loyal to God and righteousness can we best discharge our debt to the Republic and humanity.

On the one hundredth anniversary of the signing of the Declaration of Independence, the Republic of France presented to America a great statue, which most fittingly symbolizes the work and influence of the United States. It stands in the harbor of New York. It is a gigantic figure of a woman, with benignant mien and noble bearing, who is holding a flaming torch high over her head. The name given to their gift of appreciation is, "Liberty Enlightening the World." As the beams of that torch are seen far out at sea on every dark and stormy night, so the radiance of American civilization and American institutions is seen by the ends of the earth; and that radiance is due primarily to the supernatural element in American history.—*"The Star in the West," by Polemus H. Swift, pp. 305-306.*

CHAPTER IV

AMERICA AS A MODEL FOR THE FEDERATION OF MAN

IF THE entrance of the United States into the concert of nations involves the creation of a standing army, the step should not be taken. An army is always and necessarily a menace to liberty. The military education is in its very nature despotic. An army cannot tolerate free speech and free thought. The great military equipments of Europe are maintained quite as much for the enslavement of the people as for the protection of the States against foreign enemies.

(1) Where can there be found an American who does not take pleasure in the thought that many of the important features of our form of government are becoming world-wide? Nineteen republics in the new world and China in Asia have constitutions modeled upon that of the United States. The same may be said of the Canadian constitution as well as of that proposed for Australasia. The Swiss, also, have copied many feaures of our constitution. As democracy has become more aggressive in England there has resulted a movement for the decentralization of the powers of government, using in many respects the American experience as a guide. A new phrase is coming into

use: "The United States of Europe." If bodily form and substance should ever be given to the idea involved in this form of words it will be somewhat after the manner of the evolution of the United States of America. We shall see the various States first sending delegates to confer together and agree upon rules of conduct for the mutual advantage of all. There is first mere voluntary and friendly coöperation. But the rules of international conduct increase in number. When these were few, the moral force of the various States was all that was needed to insure their observance. The rules, however, multiply and become more important. It is found desirable to have a permanent Board of Arbitrators, to whom complaints may be made in case of violations of the rules of international law. There has never been any serious discussion of a permanent board of arbitration in which there was not frequent reference to the Supreme Court of the United States. As a matter of fact the formation of our Supreme Court was preceded by a Committee of the States acting as board of arbitration between the States. If the now proposed quinquennial Congress of the Nations should become an established institution; if there should be a permanent Court to settle disputes arising under the observance of the rules of the Congress; if, in course of time, the rules should be so numerous as to require permanent administrative agencies to secure their observance; then, indeed, the United States of Europe would have become one State. But we are

informed that Europe includes Asia, or Asia Europe. A new word, Eurasia,[1] has been coined to express this idea. The United States of Europe would mean, then, the United States of Eurasia. Already The Hague Court has been established and the United States of Europe have entered into joint control of a Free State on the Congo, and so for over a century there has been a joint police of the coasts of Africa on the part of the United States of Europe and America. So if there is to be a United States of Eurasia it is not at all likely that Africa will be left out.

But what shall be the attitude of the United States of America? Shall we retain our membership in the Congress of the great States? Shall we assume our full share of responsibility in the settlement of all the affairs of the world?[2] It is my opinion that it is better for the United States and better for the world to rid ourselves of every vestige of the policy of isolation and assume our full share of direct responsibility for the well-being of every part of the human race. This does not at all mean that we shall lose anything of our practical interest in the perfecting of free institutions in the New World. Rather, we shall extend that interest to every part of the globe. Such a policy would but be an additional motive for strengthening every bond between American republics; an additional motive for the formation of a United States of Pan-America.

SUPPLEMENTARY READING

CHAPTER IV

America as a Model for the Federation of Man

[1] **Eurasia.**— Is Asia, as a distinct Continent, to disappear? The question has already been raised and the term Eurasia suggested to cover the two grand divisions, hitherto separate, but constantly being brought into such close relations that the distinction ceases to mark a difference. It becomes almost insistent as one studies the map. The old boundaries are rapidly losing all significance. The Ural Mountains are within what is known as a European province and Russian maps cease to change their color as they cross the Caucasus. In all probability the Caspian will ere long be but a Russian sea; and when the same power accomplishes its purpose of securing Constantinople, with the Balkan Peninsula on the west and Asia Minor on the east, the last vestige of a continental boundary will disappear. It is significant that while it is possible to make a map of Europe alone, of Africa, of America, it is impossible to make a map of Asia without including, at least, the greater part of Europe within its scope? With the boundaries national and race distinctions are to a considerable extent disappearing. Wherever Russia goes she not only conquers, but assimilates, and England, while leaving far more of local independence and fostering far more strictly native development, still places a distinctly European stamp upon every country that she dominates. As these two practically control the development of the continent, it cannot be long before the national differences, which in default of the disappearing physical boundaries can alone define the continent, will cease in great measure to exist; not that India will ever become England, as Siberia is already, and Manchuria undoubtedly will be, Russian;

but the difference will be less continental or racial, more distinctively local, such as may fairly mark different sections of the same continent. * * *

To some there may come sadness as they read the articles and consult the map. So many things are fading into the past. Yet in their place are coming others of far more value, betokening a new life. The screech of the locomotive echoes from the walls of Jerusalem and the Taj Mahal, but it awakens the forces that have been asleep for centuries.

Europeans are gridironing the plains and burrowing into the mines of the "Middle Flowery Kingdom," but are driving famine and pestilence before them. The "Morning Calm" has vanished from Khosen, but to it will succeed the vigor of high noon. Fact, the essential prelude to success, is replacing fancy in Persia. Slav and Saxon have met on the "roof of the world."—*New York "Independent," May 4th.*

[2] **Expansion** (*a*).—The Pacific during the twentieth century will assume the importance which the Mediterranean had for the leading commercial nations of ancient times. Mediterranean means "midland." There, it meant Asia and Europe; here, it will mean Asia and America. From the Mediterranean the sceptre passed to the Atlantic; and now the time is ripe for the supremacy of that immense ocean of which the ancients knew nothing and of which we modern people as yet know so little.

In the chain of events leading up to our own time, the exploitation of the Pacific stands for the culminating one. It means the intimate joining of the youngest with the oldest nations, the union of the lusty West with the decrepit East. Whatever changes future cycles will bring about, the retaining of our road from east to west cannot be one of them.

The cutting of the Panama Canal will be the last geographical event of the first magnitude. There are no more isthmuses the severing of which could shift the commerce of the world. Looking westward over the broad expanse of the Pacific,—from San Francisco, Seattle, Port Townsend, and Portland, across the waste of water to China and the intervening island world,—imperial possibilities lie before us. We believe that in that direction is to be found our heritage of expansion. The strong

hand of the younger branch of the Germanic family of nations is about to stretch forth and grasp those wonderful regions of the earth, firmly, though kindly. That, indeed, is the last chapter in the gospel of expansion. Through the Golden Gate we look out upon the Orient. The ruling power has ever passed to younger hands, to a race unspent and with the wine of enthusiasm in its veins.

England reaped an immense advantage from the digging of the Suez Canal, far more than France, although French hands had done the work. The Panama Canal will transfer that advantage to the United States, with the all-important certainty that this advantage cannot again be transferred by any geographical cause. Therefore, the commercial supremacy of the Pacific will be final. The nation holding that supremacy will, so far as human foresight can discern, hold the supreme power on this globe.—*"America, Asia and the Pacific," by Wolf von Schierbrand, pp. 199-200.*

(*b*) It is not to the interest of the United States to propose to herself the object of supremacy in the Pacific; a regrettable phrase, too often used, provocative of antagonism by its very sound. An assured supremacy over her own possessions, and over the approaches to them, is in her case a legitimate aim, menacing none; for there is no country so situated, relatively to her, as to have access to its own ports endangered by her superior navy, which is the unfortunate relation of the British navy to Germany. . . .

The result is to leave the two chief Pacific nations, the United States and Japan, whose are the only two great navies that have coastlines on that ocean, to represent there the balance of power. This is the best security for international peace; because it represents, not a bargain, but a fact, readily ascertainable. . . .

With Japan in the Pacific, and in her attitude towards the Open Door, the case is very different from that of European or American Powers. Her nearness to China, Manchuria, Korea, gives the natural commercial advantages that short and rapid transportation always confers. Labor with her is still cheap, another advantage in open competition; but the very fact of these near natural markets, and her interest in them, cannot

but breed that sense of proprietorship which, in dealing with ill-organized states, easily glides into the attempt at political control that ultimately means control by force. Hence the frequent reports, true or untrue, that such advantage is sought and accomplished. Whether true or not, these illustrate what nations continually seek, when opportunity offers or can be made. This is in strict line with that which we call Protection; but with the difference that Protection is exercised within the sphere commonly recognized as legitimate, either by International Law or by the policy of competing states. The mingled weakness and perverseness of Chinese negotiators invite such attempt, and endanger the Open Door; give rise to continual suspicion that undue influence resting upon force is affecting equality of treatment, or is establishing a basis for inequality in the future. There can be no question that the general recent attitude of Russia and Japan, however laudably meant, does arouse such suspicions. *"The Interest of America in International Conditions," by A. T. Mahan, D.C.L., L.L.D., pp. 192-201.*

CHAPTER V

INTERCHANGE OF SERVICE BETWEEN THE OLD AND THE NEW WORLD

THE Old World needs America[1] and America needs the Old World. Our principles of government are in demand in every clime. America stands for democracy. It stands for home rule. It should never be forgotten that democracy does not mean a mere form of government. The true principle of democracy requires the use of every form of government which the diverse peoples of the earth demand. If an Indian tribe in the United States is better served by a monarchial form of government, our democracy gives them a monarchial government. Democracy does mean government by education and training. Education and environment tend naturally to give to the Indian tribe the republican form of government. We may believe that education and environment will tend to the substitution of the newer for the older forms of government. But it is a violation of the fundamental principle of democracy to make a direct attack upon any mere form of government. Always and everywhere the determining question must be: What form of government is best suited for the training of the people in the practice of conscious coöperative righteousness?

(1) The Old World needs especially the methods of diplomacy which America represents. Formerly diplomacy was a part of the system of lying and deception which is necessary for the success of despotic tyrannies. Free governments could then have little influence because of the limitations of their ability to deceive. But all this is being rapidly changed. The despot is now incurring positive disabilities in the field of diplomacy. The appeal is to the public sentiment of the world. Open diplomacy is revealing the secrets. In the Congress of the World it is the representative of the tyrannical government who is placed on the defensive, who is shorn of his power and influence on account of the necessity under which he labors to conceal the truth; while the representatives of free governments can boldly and effectively appeal to the enlightened opinion of mankind.

(2) If the Old World needs America, much more does America need the Old World. In its very nature a new world means the absence of experience, while an old world means the accumulation of experience. Man is capable of learning from the experience of others, yet, on account of the prevalence of original sin or some other equally baleful influence, men have for the most part refused to avail themselves of the experience of others. While in theory recognizing the high rational principle of vicarious suffering, they have, like the fool or the brute, trodden the beaten path to their own destruction. Americans of all people are

most in need of taking account of the experiences of the Old World. The whole history of America has tended directly to create a fool's paradise on a most gigantic scale. From our peculiar and exceptional conditions we have had three centuries of exemption from the ordinary, normal burdens of the race. We have been simply going on to the next farm and taking possession as of a free gift from a bountiful Providence. Our free acres have given to Europe a prolonged period of abnormal relief, from the ordinary burdens of an expanding population. Americans are now called upon to adjust themselves to the normal conditions of the Old World, and are in especial need of Old World experiences in dealing with ordinary industrial, social and political problems. Old World conditions are being suddenly forced upon us. The exceptional conditions to which we have been for so long a time wonted are misleading. It is Old World conditions rather than New that we need to contemplate — the problems of pauperism, the unemployed, the government of cities, the management of railways. Not that we should expect to copy the conduct of the older States; but, being still in the position of exceptional privilege, we should expect to avoid the worst mistakes of the older States. The time has fully come when isolation from the Old World should cease.

If America should enter directly into full fellowship with the Great Powers we ought to expect that the full weight of our influence would at all times be

exerted in favor of disarmament, in favor of the settlement of all disputes by peaceful means, in favor of arbitration, in favor of guaranteeing to all peoples in all lands, the management of their own local affairs. If our influence should be otherwise, it would indicate such a degree of national degeneracy that mere isolation could not save us.

(3) We ought to expect also that our enlarged international responsibilities would tend to purify and elevate our domestic politics. Our war with Spain has manifestly strengthened the cause of civil service reform. More than a quarter of a century ago our navy department was organized so as to eliminate the spoils system from its management. We came through the war with a proud consciousness that not a life was needlessly sacrificed in the navy. Our army, on the other hand, was under the care of a spoils politician, and we have the humiliating consciousness that corruption and culpable inefficiency destroyed more men than did the enemy. There has since been imperative demand for a more efficient diplomatic and consular service. As our foreign relations grow more important, higher ability in the service will be required. Especially, if we are to be responsible for the preservation of order among remote and diverse peoples, we must command governors experienced, capable, and incorruptible. The maintenance of a capable and incorruptible foreign service will have a strong tendency to elevate our domestic politics as well.

Our domestic politics have been corrupt and inefficient largely because the government has been weak. The government has been weak because the business in which the government has been engaged has been comparatively unimportant. In our cities the great industrial operations involved in a street-car service, a water-supply, and a light-supply, appear infinitely more important and respectable than the police court and the ward caucus. The city government is treated with contempt because the business in which the city is engaged is relatively contemptible. Mere police business has never commanded a high degree of respect. The city becomes respectable, and city politics becomes pure and efficient when the city itself enters directly into such great industrial enterprises as place the city clearly above any mere private corporation. The government will command respect by engaging in great enterprises, by assuming great responsibilities, by taking its full share of direct international obligations. We ought to be better able to cope with private corporations by every honest endeavor to improve the condition of alien races in remote regions. And a significant beginning in the facing of such tasks has been made in recent legislation dealing with the conservation of our natural resources, irrigation, and the Panama Canal.

SUPPLEMENTARY READING

CHAPTER V

Interchange of Service Between the Old and the New World

[1] **"The American Invasion."** — It was not till the close of last century that the United States could be said to have secured the commercial primacy of the world. But the fact that they would supersede us had long been foreseen by the more prescient amongst us. Conspicuous among these was Mr. Gladstone, who in 1878 and again in 1890 expressed in the clearest terms his conviction both as to the inevitableness of the change, and also, what was more important, his view as to the way in which it should be regarded by this country:

"It is America," he said, "who at a given time probably will wrest from us that commercial primacy. We have no title: I have no inclination to murmur at the prospect. If she acquires it, she will make the acquisition by the right of the strongest; but in this instance the strongest means the best. She will probably become what we are now—head servant in the great household of the world, the employer of all employed, because her service will be the most and the ablest. We have no more title against her than Venice, or Genoa, or Holland, has against us." . . .

It is therefore in no unfriendly spirit that we direct our attention to what, for convenience' sake, we continue to call the American invasion. Let us see, in the first place, with what weapons these invaders from the New World are able to possess themselves of markets which we have hitherto regarded as our own. The first and by far the greatest weapon by which the Americans have made the economic conquest of the Old World, is in the supply of foodstuffs. . . .

The ingenuity of American mechanism, and the skill of Amer-

lean engineers, have been employed for a generation past in reducing the bread bill of the British working man. Incidentally this has brought in its wake agricultural depression among a minority of our people, but the immense majority have fed and grown fat upon American harvests and the beef and pork of American farms. If it is an evil thing to have cheap bread, then the Americans were undoubtedly doing us an injury. . . .

After food, the second great article by which the Americans have invaded our markets is raw material, notably cotton.

. . . The Americans have brought to us a host of ingenious inventions and admirably perfected machines which we are incapable of producing for ourselves. No one can say that in sending us the typewriter, the sewing machine, the linotype, the automobile, the phonograph, the telephone, the elevator, and the incandescent electric light, they invaded any British industry. These things were their inventions. *"The Americanization of the World," by W. T. Stead, pp. 314-330.*

CHAPTER VI

INTERNATIONAL CO-OPERATION THE HOPE OF DEMOCRACY

IF THE leading States do not coöperate for the sake of preventing abominations and for the sake of the progressive enlightenment of the race, there will be a constant tendency to revert to the barbarism of war and national jealousy. With the advent of the spirit of democracy there did come the habit of coöperation among the States. The nations agreed among themselves upon effective methods for policing the ocean for the suppression of piracy. They agreed among themselves so to legislate as to make the slave trade an act of piracy. There has been long-continued and more or less effective coöperation for the suppression of the slave-trade. Out of this policy has come the entering of one nation after another, with the coöperation and consent of the other nations, into the Continent of Africa, with, at least, the profession of motives of humanity and a purpose of freeing the natives from their worst oppressors. It is by the agreement of the nations that Africa has become divided into "spheres of influence," and that the Congo Free State has been founded with provision for a liberal and civilizing government for the natives, and a friendly meeting-place for all the nations.

Home of the Mighty

AMALIENBORG PALACE, COPENHAGEN, DENMARK

By direct international legislation the area of possible war has been diminished by neutralizing the territory of Belgium, Switzerland and other regions. By the same process the area of Turkish tyranny has been diminished in Europe and in Africa. This tendency of the nations to substitute law for brute force in their conduct towards each other is an essential, an integral element in the growth of democracy. Democracy cannot survive in a nation pursuing a policy of selfish isolation. A people mean enough to clutch at liberty and enlightenment and hold them as a peculiar and special privilege will speedily become mean enough to be made the victims of despotism and slavery. There would be no Swiss democracy had there not been Swiss citizens whose souls were on fire to carry the principles of the new education into all lands. Democracy must be true to its original principle of practical sympathy for the oppressed, the ignorant, and the debased of every land.[1]

(1) It was quite in harmony with the spirit of democracy that the Congress of the Nations legislated to limit the field of war. This is what democracy means: it means the substitution of law and friendly coöperation for brute force. Every act of the Congress of the Nations to mitigate the severity of war is a step in the direction of the triumph of reason and conscience over the brute in man. Such are the laws forbidding the use of certain weapons unnecessarily cruel; the laws providing for the ambulance and various other

agencies for caring for the sick and wounded. The same may be said of the laws restricting the operation of the blockade and those protecting private property by land and sea in time of war.

(2) But shall the representatives from democracies unite with those from monarchies in the making and enforcing of international laws? Certainly. Democracy has never made progress in any other way. It has always been because the few who have believed in democracy were willing to unite with the many who have believed in despotism to secure a more rational order, that the idea of democracy has grown. It is by the appeal to the sense of right which law involves that the despotic element is being eliminated from the freest States. Democracy has nothing to lose and everything to gain by the widest possible union of States for the extension of the bounds of international law. But the democratic States must contend for the principle of home rule. They must resist the idea of a massed world-despotism. The cosmopolitan democrat does not aim at the securing of one particular form of government upon any other principle than that of the intelligent voluntary choice of all the people. He attacks no mere form of government. He only insists that, whatever be the form, it must seek to win, and in the end must actually win the voluntary support of its citizens.

The subjects of the Czar are perfectly free to teach their doctrines both as to church and State in all demo-

cratic lands. Citizens from democratic States are not thus free to teach their doctrines in Russia. There is here an apparent inequality and injustice. But the difference grows out of radically different views of government. So long as the people of Russia are content with their lot, so long as the Czar succeeds in retaining the support of the great body of his subjects, the democrat has no ground for interference. But the democrat has a right to object to the extension of the Russian government over alien peoples. That government is a challenge to every other form of government. It is therefore naturally and necessarily hostile to every other form of government and to every other religion. Other States have a right to resist its encroachments. Democratic States have also a right to put forward some form of interference when Russia, having made an acquisition of territory under a guarantee of the extension of perpetual religious freedom to the inhabitants, should afterwards proceed with methods of forcible conversion. There may come a state of affairs in the relation of the government to its ordinary citizens that may give rise to a case for interference. It is estimated that one-sixth of the Russian peasants are Protestants and are therefore in revolt against the Orthodox Church. If this class should greatly increase, and if the government should be led to adopt methods of repression cruel and revolting to the moral sense of mankind, it would be the duty of other States to inter-

fere,— first by friendly admonition, while in an extreme case forcible interference might be justified.

The democratic State is likewise a challenge to every despotism in the world, but democrats are slow to learn that there is a radical difference between the democratic and the despotic challenge. The despot challenges by the sword, as well as by the Koran or by the orthodox faith. The democrat cannot challenge by the sword. He can only challenge by the one primary sense of human brotherhood.[2] Democracy has failed and continues to fail because democrats do not rightly apprehend this difference. Democracy offers but one competition and that is a competition in brotherhood, or friendly coöperation. Despotism may appeal to every conceivable motive. Democracy will become irresistible as the eye of the public becomes single and all hope of justice is seen to rest upon one motive.

SUPPLEMENTARY READING

CHAPTER VI

International Coöperation the Hope of Democracy

[1] **United States in World Politics.** — For better or for worse, the United States has thus become a colonial power in the fullest sense of the word. Its latest acquisitions, near and far, are all situated in the tropics, and are therefore subject to the limitations imposed by tropical conditions. * * * Owing to certain peculiar characteristics, the problems they present are not quite the same as those of the colonies of the various European nations; and as the special ideals of their American owners add another element of variety, their relation to the country which holds them is in some ways novel.

Before the American government could regulate the status of the new lands which had so suddenly come under its care, it had first to clear up the uncertainty about their position under the American Constitution, a document not framed to meet contingencies of this kind. This fundamental question was settled in a rather extraordinary manner by the two "Insular Decisions" of the Supreme Court of the United States. * * * According to these decisions, new territories belonging to the United States are from the date of their acquisition *parts* of the country, not mere *possessions;* but only those which, like Texas and Hawaii, have come in by the action of both branches of Congress, enjoy from the first the full rights of the American Constitution. Territory obtained by a treaty, like that gained from Spain, is subject to legislation of Congress, as if it were a mere possession.

* * * * * * * * *

The moral for Americans of the various international complications in which they find themselves involved is, after all, the old one that greatness brings responsibilities. These they will

have to face, for it is now too late for them to return to the simple life of their earlier history. They will do well, therefore, to take to heart the words of the President [Theodore Roosevelt]:

"We have no choice, we people of the United States, as to whether or not we shall play a great part in the world. That has been determined for us by fate, by the march of events. We have to play that part. All that we can decide is whether we shall play it well or ill."—"*United States as a World Power,*" *by Archibald Cary Coolidge, pp. 140-141, 373-4.*

[8]**Race Questions.**—In the last fifteen years the United States has changed from a youth among the nations to a full grown man. No longer able to shut itself within itself, and, engrossed with internal affairs, to ignore the large affairs of the world as a whole, it finds its position and necessities have compelled a growing interest and participation in world questions.

The constant internal disturbances in the small countries near the Canal Zone, and their consequent opportunities for foreign intervention, has already necessitated the assumption on our part of our share of the "white man's burden." There is every indication this burden will increase. This new activity has already excited an apprehension which has caused a change in our relations with Spanish-American powers, with on their part a consequent leaning toward European and Asiatic nations for support.

* * *

The immigration of the Chinaman and his subsequent exclusion was considered merely as an internal question; or, in other words, from the point of view as to what effect his admission or exclusion would have on our home affairs. What the Chinaman thought about it or what action on his part it might lead to was never considered. The great majority never conceived this question as being of international importance.

The more recent dispute having to do with the admission of Japanese students to California schools opened the eyes of many to the fact that in settling these questions, the consideration of the white man's point of view to the exclusion of what the people of the other race thought about it might lead to serious results. —*"Observer," in "The Chicago Daily Tribune," March 10, 1913.*

QUESTIONS FOR REVIEW. PART XII

1. What are the two methods of harmonizing the individual and the State? What ancient nations exhibited the spirit of liberty? How did America save Europe from Oriental despotism? How did the issue become clearly defined? Name the striking events in Europe illustrating the issue between democracy and despotism. How is the arming of Europe related to the struggle for liberty? How may democracy progress without revolution? Does democracy involve sympathy with all oppressed peoples?

2. How do the Swiss aid the oppressed in other lands? What did the English free-trader aim to accomplish? What method of aid to the oppressed has England adopted? When did America become free to adopt either the Swiss or the English method? What new doctrines of tariff policy arose after the Civil war? Why did we build a fleet? What influence did the United States exert over the later Armenian massacres?

3. Has the policy of expansion been at any time calmly debated? What arguments have been used for and against expansion? Do the same arguments for isolation hold that prevailed a hundred years ago? What are some of the changed conditions? Do European alliances now tend to promote war or peace?

4. Does the United States intend to enter upon a career of foreign conquest? Who is to blame for the war with the Filipinos? May Americans unite in a policy of world-wide peaceable expansion? How far has the American model been already copied? Are the United States of Europe moving in lines marked out by the United States of America?

5. Does the Old World need American democracy? Does it need American diplomacy? Why does America especially need the Old World? Which is the normal, permanent condition: free acres to be had for the taking, or lands all occupied? How may America avoid the worst mistakes of the Old World?

6. Does democracy require the coöperation of the nations? Give important instances of international cooperation. Will democracy gain by friendly coöperation with believers in despotism? May the despot consistently force a form of government upon an unwilling people? May the democrat do the same?

SUBJECTS FOR SPECIAL STUDY

1. The Holy Alliance and the Monroe Doctrine.

2. The English colonial and imperial policy.

3. The American debt to the Old World.

4. The principles of federalism. Local government harmonized under a general government.

5. Lessons from the Old World; referendum; ballot.

6. Arguments pro and con for a policy of expansion.

THE CONSTRUCTIVE PERIOD OF

American Politics

I. The Period of Dominant Foreign Influence

II. The Period of Dominant Internal Development

A Course of Twelve Lecture-Studies

by

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EDITOR'S NOTE

THE following excellent outline of the rise of American politics is designed as a guide for home study or for programs for study by clubs. It is suggested that one lecture be used for each session of a club. If more detailed study is desired a single lecture might be spread over more than one meeting. In following the outline it should be remembered that there is much room for independent treatment on the part of the writer of papers, the outline furnishing only the more important topics.

BIBLIOGRAPHY

The following are the principal volumes to which reference has been made in this course. There has been no attempt to make an exhaustive reading list, as of course that might be extended indefinitely.

It is suggested that everyone who follows the course read one of the first four. Then reference may be made as time allows to more extensive works.

Goldwin Smith, *The United States.*

Harry Pratt Judson, *Growth of the American Nation.*

Albert Bushnell Hart, *Formation of the Union.*

Each of the above is a single small volume, the first written from an English, the others from an American, point of view.

E. Benjamin Andrews, *History of the United States.* (2 vols.)

These two volumes, of convenient size, give a general view. They enter more into detail than the brief sketches mentioned above. The story is brought down to 1894.

George Bancroft, *History of the United States.*

There are several editions, each in several volumes. The history is really that of the thirteen colonies and of the revolt from Great Britain, closing with the end of the revolutionary war.

Richard Hildreth, *History of the United States.*

This work is in six volumes. The first three are devoted to the colonial and revolutionary period, the last three cover the administrations from Washington to Monroe.

James Schouler, *History of the United States.*

This is a very useful history. It forms a convenient supplement to Bancroft, as it begins with the end of the revolutionary war. The last volume closes with the opening of the civil war.

J. B. McMaster, *History of the People of the United States.*

John Fiske, *The American Revolution* (2 vols.), *A Critical Period of American History* (from the end of the revolutionary war to the adoption of the constitution)

The American Statesmen Series.

This series consists of a number of biographies, each in one or two small volumes. They are brief, but in the main excellent. Lodge's *Washington,* Morse's *Jefferson,* Schurz's *Clay,* Gay's *Madison,* Lodge's *Hamilton,* and Morse's *Adams,* and *J. Q. Adams,* are useful for this course.

The American Commonwealth Series.

This series consists of a number of state histories, on the same plan as the statesmen series.

Henry Adams, *History of the United States.*

An acute criticism of the administrations of Jefferson and Madison.

George Ticknor Curtis, *Constitutional History of the United States.*

A valuable study from a purely constitutional point of view.

Joseph Story, *Commentaries on the Constitution.*

Richard Frothingham, *The Rise of the Republic of the United States.*

Thomas Donaldson, *The Public Domain* (Washington: Government Printing Office, 1894. 47th Congress, H. R., Misc. Doc. 45, Pt. 4).

Justin Winsor, *Narrative and Critical History of the United States,* especially Vols. VI.-VIII.

Herman E. von Holst, *Constitutional History of the United States.*

A voluminous and eloquent discussion of the philosophy of American politics.

Edward Stanwood, *History of Presidential Elections.*

N. S. Shaler, *The United States of America.*

Horace Greeley, *The American Conflict.*

Henry Wilson, *Rise and Fall of the Slave Power in America.*

Jefferson Davis, *Rise and Fall of the Confederate Government.*

Alexander H. Stephens, *Constitutional View of the War between the States.*

E. A. Pollard, *The Lost Cause.*

F. W. Taussig, *Tariff History of the United States.*

George F. Tucker, *The Monroe Doctrine.*

PART I

The Period of Dominant Foreign Influence

LECTURE I

THE SEPARATION FROM ENGLAND

Goldwin Smith, 64-115; Hart, 42-80; Judson, 55-83; Andrews, 161-212. Bancroft and Hildreth treat the subject at length, each in several volumes. Fiske devotes two small volumes to the topic.

The thirteen English colonies in America had grown, in less than two centuries, to a considerable population and wealth. They had little accord one with another, and were all attached to the mother country by ties both of interest and of sentiment. But the permanent dependence of colonies over-seas was impossible. Separation was sure to come in time. However, the situation was entirely novel in the eighteenth century, and so we need not wonder that it was not clearly understood. The inevitable separation was precipitated by the reactionary schemes of George III., and by the perverse blundering of ministers. The Americans were driven to opposition, to revolt, and finally to declare their independence. The pressure of war compelled the colonies to unite. The English people gave little support to the government in the war on the colonies, while the French gladly aided in the dismemberment of the British Empire. Thus

finally ministers were compelled to yield, and to make peace on the basis of American independence.

I. Causes of the Separation. Fiske, Rev., I., chap. 1, 2.

a Obstacles removed:
1. Conquest of New France.
2. Colonists inured to war.
3. Colonists become conscious of their power.

b Change of relation to England.
The Revolution of 1688 had made Parliament supreme in the English government. The colonies had been constituted by the Crown. Parliament now undertook to assert and exercise control.

c The old colonial theory—Colonies exist for the benefit of the home country. This must collapse when the colony becomes strong. Commercial restriction.

d The question of taxes.
1. The pretext.
2. The answer.
3. The legal question.
4. The principle involved.

e The policy of George III.
1. The King's character.
2. His political aims.
3. English parties.
4. Relation of the American cause to English reform.

f The five abominable acts.

II. Obstacles to Separation.

a The sentiment of loyalty.
b Lack of colonial unity.
c British power.

III. The Revolutionary Government.

a Organization of Congress.
b And of state governments.
c Previous attempts at federation — Franklin's plan.
d Difficulties of Congress.

IV. THE DECLARATION OF INDEPENDENCE.

a Who made it?
b By what authority?
c Its nature and bearing.
d Who was made independent? Story, § § 206-17.

EXERCISES

1. Sketch the successive steps in the alienation of the colonies.
2. What was the colonial system?
3. Give the English argument for the supremacy of Parliament.
4. Show the bearing of English politics on the course of ministers.
5. Trace the effect of the imperfect union of the colonies on the war.

LECTURE II

THE LEAGUE OF FRIENDSHIP

Judson, 84-99; Hart, 45-65; Andrews, 223-240; Fiske's "Critical Period" is well worth reading, entire; Hildreth, I., ch. xlvi.-xlvii.; Schouler, I., 1-51; McMaster, I., ch. iii.-v.; Bancroft, Const., Bk. I. The Confederation, Bk. II. On the Way to a Federal Convention, Bk. III. The Convention; Curtis, I., ch. v.-xxxii.; Public Domain, ch. iii.

"While the war was in progress, the states adopted a constitution of government called 'Articles of Confederation.' This proved a loose and weak device, and under it the states, when the war came to an end, were in a state of discord nearly approaching anarchy. They had originally been entirely separate one from another, and had been brought together only by the common danger. The critical state of affairs finally led to the appointment of delegates to a general convention for

the revision of the Articles of Confederation. This convention, meeting at Philadelphia in 1787, formed an entirely new constitution which provided a strong government. The constitution was ratified by the states, although many were reluctant, and went into operation in 1789."

I. THE ARTICLES BEFORE CONGRESS. 1776-7.

a The general plan. Curtis, I., 98-103.

b The articles adopted — Nov. 15, 1777. Hildreth, III., 396-402.

II. THE ARTICLES BEFORE THE STATES. 1777-81.

Public Domain, ch. iii.; Fiske, 187-198.

a Land claims of the states. Curtis, I., 90-2.

b The course of Maryland. Curtis, I., 93-4.

c The land ceded.

d The articles in effect. March 1, 1781.

III. COLLAPSE OF THE CONFEDERATION. McMaster, I., 103-417; Schouler, I., 16-23; Story, §§ 243-71; Curtis, I., ch. vi.-xx., 224; Fiske, ch. iv.

a The states quarrel.

b Neglect of debts.

c Neglect of commerce.

d Neglect of treaty.

e Neglect of west — secession threatened.

f Misgovernment in states. "Rag money."

g Insurrection.

h The Confederation a failure.

IV. ATTEMPTS TO IMPROVE THE ARTICLES. Curtis, I., ch. xiii., xv.

a The five per cent, scheme.

b The revenue scheme.

c The commercial scheme.

d Radical amendment.

V. THE CONSTITUTIONAL CONVENTION. Hildreth, III., ch. xlvii.; Curtis, I., ch. xv-xxxvi.; McMaster, I., 417-453; Bancroft, Const., I., 267-278; II., 1-225; Fiske, Critical Period, 214-305; Schouler, I., 39-51.

a The Annapolis meeting.
b Organization and powers of the convention.
c Analysis of its membership.
d Difficulties and methods.
e The compromises.
f The result — the Constitution.

EXERCISES

1. Point out the leading defects in the Articles of Confederation.
2. Show why it was better that nobody should be satisfied with the Constitution.
3. Give an outline of the paper money experience in Rhode Island.
4. What occasions for dissension did the Constitution withdraw from the states?
5. Contrast the Constitution with the Articles of Confederation.

LECTURE III

THE FIRST ADMINISTRATION

Judson, 103-115; Hart, 65-153; Andrews, I., 235-262; Hildreth, I., ch. xlviii., II., ch. i.-v.; McMaster, I., ch. v., vi., vii.; Schouler, I., 53-237; Bancroft, Const., Bk. V.

The people of the states accepted the Constitution in sheer desperation, because they saw no other escape from virtual anarchy. Few really liked the new plan of government. The opposition fought it bitterly, but the logic of facts was against them, and so the Federalists prevailed. "Government under the new Constitu-

tion was organized in 1789, Washington being chosen president. The first Congress enacted a series of momentous measures, creating the executive department, levying a tariff and an excise, funding the public debt, establishing the bank of the United States, and providing for a mint. The effect of this definite organization of the republic was to establish social order and to give a great impetus to business prosperity. At the same time differences of opinion as to measures and as to the interpretation of the Constitution led to the beginning of our political party divisions."

I. CONDITION OF THE UNITED STATES IN 1789.
McMaster, I., ch. i., gives an interesting view for 1784; Fiske, Critical Period, ch. ii.-iv.

II. WHY THE CONSTITUTION WAS ADOPTED.

III. HOW THE CONSTITUTION WAS ADOPTED.

McMaster, I., 454-503; Schouler, I., 53-83.

a The Constitution satisfied no one. 1. Vote in the Philadelphia convention. 2. Vote in the state conventions.
b Parties in the states.
c The Federalist.
d How majorities were secured.

IV. ORGANIZATION OF NATIONAL GOVERNMENT.
McMaster, I., ch. vi.; II., ch. vii., 25-32, 35-43, 182-6; Schouler, I., 84-180; Hildreth, IV., ch. i.-iv.

a Washington's policy.
b The first cabinet.
c Finance. 1. Tariff. 2. Funding and assumption. 3. Excise. 4. The bank. 5. The mint. McMaster, I., 484 note, 589; II., 72, 360; Schouler, I., 251.
d The supreme court. 1. The Georgia case.

EXERCISES

1. What was the "Federalist"?
2. Outline Hamilton's scheme for organizing the public debt.
3. To what extent were Jefferson's views correct as to the tendency of Hamilton's plans?
4. Purposes and methods of the first tariff act.
5. The economic and social effects of the new government.

LECTURE IV

THE POLITICAL REVOLUTION OF 1801

Goldwin Smith, 139-156; Judson, 116-147; Hart, 154-175; Andrews, 263-304; McMaster, II., ch. viii.-xi.; Schouler, I., 180-510; Hildreth, IV.-VI.

At the same time with the organization of the new government the French revolution began its course. This soon resulted in war between France and other European powers, and presently the United States was about the only neutral nation. American commerce had increased rapidly after the Constitution went into effect, and the European wars stimulated it further. But, on the other hand, there was trouble with both belligerents. France expected aid from America under the treaty of 1778. And England seized every pretext to capture American vessels. A large number of the American people sympathized with France. But Washington held firmly to the ground of strict neutrality, and in 1795 he negotiated a treaty with England which prevented war. Meanwhile (1797) Adams became president. The French were greatly irritated at the Ameri-

can treaty with England, and refused to receive the new American minister. Then, when Adams sent special commissioners in his place, the French foreign minister, Talleyrand, intimated that a bribe would be necessary in order to purchase peace. This aroused the utmost indignation in America — an indignation stimulated by the fact that the French also were lawlessly seizing American vessels — and war preparations went on apace. When France saw that America was in earnest, however, peace was not difficult to attain. In 1800 a convention settled all the points in dispute.

The war fever made the Federalists popular. But they took advantage of their success to enact obnoxious measures, the Alien and Sedition acts, which destroyed the goodwill of the people. The Republican party had been organized by Jefferson, and was really in closer sympathy with the tendency of the age than were the Federalists. In 1800 the election was carried by the Republicans, and Jefferson became president. The Federalists, after this, were a minority until they disappeared altogether as a party.

I. Foreign Affairs. McMaster, II., ch. viii.-xi.; Schouler, I., 259-87, 304-40, 358-488; Hildreth, IV., ch. vi., viii.-ix.; V., ch. x.-xv.

a England and the treaty of 1783.
b France and the treaty of 1778.
c The French revolution.
d The French envoy.
e The Jay treaty.
f The X. Y. Z. affair.
g Hostilities with France.

II. THE FIRST POLITICAL PARTIES. McMaster, II., 49-53, and ch. viii.-xi.; Schouler, I., 180-90, 198-203, 217-235, 354-440. Hildreth as above.

a The Federalists: Hamilton and Adams. 1. Theories of government. 2. Elements of strength. 3. Elements of weakness.

b The Republicans; Jefferson. 1. Theories of government. 2. Elements of strength. 3. Elements of weakness.

c Dissensions in the cabinet.

d Opposition in Congress.

e A French party and an English party.

f Party spirit.

g Republican gains.

h The last Federalist victory — 1798.

i Alien and Sedition laws.

j Federalist factions.

III. THE ELECTION OF 1800-1801. McMaster, II., ch. vii.; Schouler, I., 447-510. Hildreth, as above.

a The first party platform.

b The choice of state legislatures.

c The electoral colleges.

d The struggle in Congress.

e Triumph of Jefferson.

EXERCISES

1. The origin of national political parties.
2. What were the main achievements of the Federalist administrations?
3. Causes of the Federalist overthrow.
4. Good and bad sides of the Jay treaty.
5. Merits and defects of Federalism.

LECTURE V

JEFFERSONIAN REPUBLICANISM

Goldwin Smith, 156-161; Judson, 148-160; Hart, 176-188; Andrews, I., 305-314; McMaster, II., ch. xiii., III., ch. xiv.-xvii.;

Schouler, II., 1-96; Henry Adams, I. and II.; Hildreth, V., ch. xvi.-xvii.

Jefferson's first term was highly successful. His personal character and political ideas were such as to put him in touch with the majority of the people. He was thoroughly democratic in his notions, and at once swept away the formal ceremonial which had been maintained by his predecessors. In finance he aimed above all at economy and the reduction of the public debt. In this he succeeded beyond his expectations. The most brilliant achievement of the administration was the purchase of Louisiana, although this action did not accord with Jefferson's view of the powers of the government under a strict construction of the Constitution. In the election of 1804 the Federalist party crumbled to pieces, and Jefferson was reëlected by an overwhelming vote.

I. CHARACTER OF JEFFERSON. Schouler, I., 189-94; II., 93-6, 99-100, 225; Hildreth, VI., 139-142; H. Adams, I.

II. ANALYSIS OF HIS POLITICAL IDEAS. H. Adams, I.

a Interpretation of the Constitution.
b Administration of government.
c Foreign policy.
d Popular rights.
e National industries.

III. THE VIRGINIAN REPUBLICANS AND THE NORTHERN DEMOCRATS. H. Adams, I.

IV. GALLATIN'S FINANCIAL POLICY. Schouler, II., 22; Stevens' *Gallatin*.

V. JEFFERSON AND THE JUDICIARY. McMaster, II., 607, 611; III., ch. xvii.; Schouler, II., 25-6, 61, 86-9; H. Adams, II., ch. x.

a The act of 1801.
b Impeachments.

VI. JEFFERSON AND THE CIVIL SERVICE. McMaster, II., 583-7; Schouler, II., 6-14.

a Appointments.
b Removals.

VII. THE LOUISIANA PURCHASE. McMaster, II., 625-35., III., ch. xiv.; Schouler, II., 40-6, 49-58; H. Adams, II., ch. ii.-vi.

a The Mississippi outlet.
b France in Louisiana.
c The purchase.
d The Constitutional question.

VIII. THE REPUBLICAN COURT UNDER JEFFERSON. Schouler, II., 14-15, 90-1.

a Jeffersonian simplicity.
b The President's message.

IX. COLLAPSE OF THE FEDERALISTS — ELECTION OF 1804. McMaster, III., 187-199.

a Popularity of the administration.
b Reasons for the Federalist decadence.

EXERCISES

1. The main achievements of Jeffersons's first term.
2. Benefits and evils of Gallatin's administration of finance.
3. How far did Jefferson follow Federalist practice?
4. The importance of the acquisition of Louisiana.
5. Contrast the political principles of Hamilton and Jefferson.

LECTURE VI

THE POLITICS OF THE WAR OF 1812

Goldwin Smith, 161-174; Judson, 161-183; Hart, 191-222; Andrews, I., 315-324; McMaster, III., ch. xviii.-xxiii., IV., xxiv.-xxix.; Schouler, II., 98-491; H. Adams, III., ch. iv., xvi.-xviii., V., ch. vi., vii., viii., ix.

Jefferson's second term was not so successful as the first. The wars between France and England were renewed, and again the United States was the only neutral. The aggressions of the belligerents on American commerce were so exasperating that in 1807 Jefferson induced Congress to lay an embargo on all foreign commerce. This failed to produce the effect intended, and the act was repealed early in 1809. The embargo was a favorite idea of Jefferson as a means of "peaceable coercion." Its failure greatly impaired his influence. Madison became President in 1809. Failing to secure just treatment from Great Britain, the administration was at last induced to recommend war, and Congress promptly acted. This was under the influence of Henry Clay and the "young Republicans." Their plan was to annex Canada. In fact, their military operations resulted in no marked success. But in the seas and the great lakes the little American navy won brilliant victories. The overthrow of Napoleon in 1814 led Great Britain to desire peace. And so the war came to an end.

I. THE WORLD AT WAR. Schouler, II., 108-10, 151-221.

a The death struggle between France and England.
b The coalition.
c Napoleon's continental policy.
d Fate of European neutrals.

II. THE WAR AND NEUTRAL COMMERCE. McMaster, III., 219-40, 270-278.

a Effect of the maritime war on belligerent commerce.
b The old colonial system.
c The rule of 1756.
d The neutral flag.

e "Neutral frauds."
f Admiralty decisions.
g The orders in council.
h The Berlin and Milan decrees. H. Adams, III., ch. xvi.

III. THE IMPRESSMENT OF SEAMEN. McMaster, III., 240-270; Schouler, II., 114, 117, 154, 163-7, 408; H. Adams, II., 335-9, 384, 393, 423; III., 93-4; VI., 134-5; VII., 19-20.

a The press gang.
b Desertion.
c The right of search.
d Expatriation.
e Fraudulent papers.
f The English side.
g The American side.

IV. JEFFERSON'S "PEACEABLE COERCION." McMaster, III., ch. xix.; Schouler, II., 178-216; H. Adams, IV., chs. vii., xi., xii., xiv., xv.

a Endless negotiation.
b Embargo.
c Effect on America.
d Effect on England.
e Supplementary acts.
f The force bill.
g Sedition in New England.
h Embargo repealed.
i Election of Madison.
j Retirement of Jefferson.

V. DRIFTING INTO WAR. McMaster, III., chs. xx.-xxi.; Schouler, II., 217, 310-394; H. Adams, V.

a Non-intercourse.
b Action of Napoleon.
c English obstinacy and violence.
d Rise of the war party.
e A positive policy.
f The President follows.

VI. War. McMaster, III., ch. xxiii., 450-8; IV., ch. xxiv.-xxix.; Schouler, II., 394-491; H. Adams, VI.-IX.

a The declaration.
b Inadequate preparation.
c Plans of the war party.
d The conquest of Canada.
e The navy and privateers.
f The peace party.
g Course of New England.
h Hartford convention.
i Negotiations for peace.
j Treaty of Ghent.

VII. Political Results.

a The new Republican party.
b End of the Federalists.
c Foreign relations.
d A new era.

EXERCISES

1. Successive acts of France and England aimed at American commerce.
2. Causes of the American failure in military operations.
3. Effects of the long embargo.
4. New England secessionists.
5. Was the war of 1812 a wise measure?

PART II

The Period of Dominant Internal Development

LECTURE VII

THE ERA OF GOOD FEELING

Goldwin Smith, 175-91; Hart, 223-48; Judson, 189-99; Andrews, I., 325-47.

With the end of the long wars between France and England the United States ceased to be the only neutral power, and the importance of American foreign commerce, as well as the constant recurrence of foreign difficulties, came to an end. Thenceforth the new republic was left to the orderly development of its material and social resources. The angry politics of the Federalist era passed away, and there was a general reconstruction of parties. Emigration to the West became very large, powerfully stimulated by the application of steam to transportation. Manufactures had grown to considerable proportions, under the impulse of the Embargo and the war. The active English competition which followed the treaty of Ghent was met by a series of protective tariff laws, and the disordered finances of the country were brought back to good condition by the restoration of the Bank of the United States. What afterward became known as the Ameri-

can system of Henry Clay included a protective tariff, a series of internal improvements for the benefit of commerce, and the preservation of the Continent from European interference. The last point was embodied in the Monroe Doctrine, so called from President Monroe's Message of 1823.

I. CHARACTER OF THE PERIOD. Schouler, III., 37-57. A period of transition, social and political.

II. SETTLEMENT AND INFLUENCE OF THE WEST. Schaler's *United States*, ch. v.

a The emigration.
b The three lines of travel.
c Means of transportation.
d Pioneer life.

III. INTERNAL IMPROVEMENT.

Turnpikes and canals.

IV. THE SECOND BANK OF THE UNITED STATES. Schouler, II., 446-8.

V. THE PROTECTIVE TARIFF. Schouler, I., 86-90; II., 450; III., 40-3, 295-8; Taussig, 8-24, 68-78.

a The tariff of 1789.
b The Calhoun tariff (1816).
c The Clay tariff (1824).

VI. THE MISSOURI COMPROMISE. Schouler, III., 101, 147-73, 178-86; Judson, 273-81.

a The Tallmadge amendment.
b Maine and Missouri.
c The compromise.
d The struggle renewed.

VII. THE MONROE DOCTRINE. Schouler, III., 277-93; Tucker's *Monroe Doctrine;* Gilman's *Monroe*, ch. vii.; also app.

iv. D, for a bibliography on the Monroe Doctrine, by Professor J. F. Jameson.

a Relations with European powers.
b The Spanish-American revolt.
c The "Holy Alliance."
d Canning and Rush.
e Monroe's message.
f Analysis of the doctrine.
g Application to Mexico.
h Venezuela.

EXERCISES

1. Why was "the era of good feeling" so called?
2. The motives and political effects of the settlement of the West.
3. The policy of internal improvements.
4. Contrast the tariff acts of 1789, 1816, and 1824.
5. Trace the origin and growth of the Monroe Doctrine.

LECTURE VIII

THE REIGN OF ANDREW JACKSON

Goldwin Smith, 191-205; Hart, 248-62; Judson, 210-33; Andrews, I., 348-62.

Factional opposition to John Quincy Adams brought about the elevation of Jackson to the presidency. He had strong elements of popularity and was able to form a well-organized political party. South Carolina was bitterly opposed to the extreme protective tariff laws passed in 1828 and 1832, and in the latter year declared these laws null and void within her limits. Jackson threatened coercion, but Congress in 1832 passed a compromise tariff bill by which the high duties were to be

reduced gradually. Nullification was accordingly withdrawn. The followers of Clay and the various other elements of the opposition to Jackson united under the name of the Whig party. Jackson attacked the Bank of the United States, vetoed a bill for its recharter, and had the federal deposits removed from its keeping. Through all his presidency Jackson was constantly at war with somebody. And in the end he won all his battles.

I. THE PERSONALITY OF JACKSON. Schouler, III., 61-7.

II. INTELLECTUAL AND SOCIAL DEVELOPMENT OF THE REPUBLIC. Schouler, III., 507-29; IV., 1-31; Judson, 258-68.

III. THE ELECTION OF JACKSON. Schouler, III., 410-49.

IV. "TO THE VICTOR BELONG THE SPOILS." Schouler, III., 451-62; Schurz's *Clay*, 332-7.

V. THE AMERICAN SYSTEM. Schouler, III., 295, 420-26; Sumner's *Jackson*, ch. ix., x.; Taussig, 78-103.

a Internal improvements.
b The tariff of 1828.

VI. NULLIFICATION. Schouler, III., 482-91; IV., 65, 85-109; Sumner's *Jackson*, ch. ix., x., xiii.; Taussig, 103-112.

a The tariff of 1832.
b The South Carolina convention.
c Jackson and the nullifiers.
d The force bill and the tariff of 1833.
e The theory of nullification.

VII. THE WAR ON THE BANK. Schouler, IV., 44-54, 68-70, 132-75; Sumner's *Jackson*, ch. xi., xiii., xiv.

a The bank and politics.
b The charter vetoed.
c Removal of the deposits.
d Economic effects.

VIII. GENESIS OF THE WHIG PARTY. Schouler, IV., 191-3.
IX. RETIREMENT OF JACKSON. Schouler, IV., 265-75.
X. THE MEANING OF JACKSON.

EXERCISES

1. The policy of Jackson with reference to the civil service.
2. Analysis of the elements which composed the Whig party.
3. Main provisions of the tariff act of 1833.
4. Compare the organization of the two banks of the United States.
5. Summary and criticism of the speeches of Webster and Hayne, in the "Great Debate."

LECTURE IX

THE WHIG TRIUMPH

Goldwin Smith, 205-9; Judson, 234-57; Andrews, I., 362-9.

Expansion of business, over-speculation and the rash finance measures of Jackson's administration, led to a great business panic in 1837. Jackson had succeeded in securing the nomination and election of his loyal follower, Van Buren, as his successor in the presidency. But the business disasters turned the tide of popularity against the Democrats. In 1840 a "tidal wave" overwhelmed Van Buren, and carried the Whigs to victory. But the Whig president, General Harrison, died only a month after his inauguration. The vice president, Tyler, thus became president, and he turned against the party which had elected him. So the first Whig victory was fruitless.

I. The Whig Leaders.

II. The Panic of 1837. Schouler, IV., 257-64, 276-82; Schurz's *Clay*, ch. xix.

a Expansion.

b Speculation.

c Policy of the treasury.

1. Distribution of the surplus.
2. The specie circular.

d The crash.

e National and state governments involved.

III. Van Buren's Administration. Schouler, IV., 283-90,324.

a Finance.

b The civil service.

IV. The Election of 1840. Schouler, IV., 328-40.

a The Harrisburgh convention.

b The "hard cider and log cabin" campaign.

c The Whig tidal wave.

V. The Whig Triumph — President Harrison. Schouler, IV., 359-66.

VI. The Whig Disaster — President Tyler. Schouler, IV., 367-76.

EXERCISES

1. Some causes of the financial crisis of 1837.
2. Explain the independent treasury plan.
3. Contrast between Clay and Webster.
4. The public land policy of Henry Clay.
5. Causes of the Whig victory of 1840.

LECTURE X

THE SPOLIATION OF MEXICO

Goldwin Smith, 209-12; Judson, 254-75, 273-90; Andrews, II., 3-29.

John Tyler vetoed distinctive Whig measures, and set out to secure a reëlection to the presidency through a

political machine of his own. He failed in the end, however, to win support from either party. The Whigs nominated Clay. Van Buren seemed sure of the Democratic nomination. But he was beaten by a new political question—the annexation of Texas.

Texas, settled by American slaveholders, had revolted from Mexico, and sought admission to the American Union. A treaty of annexation was negotiated by Tyler early in 1844, but was rejected by the Senate. The question was then taken into politics. Van Buren and Clay were both opposed to annexation. Van Buren lost the Democratic nomination on that account, and Clay was defeated at the polls by the defection of free-soil Whigs, who distrusted his firmness in opposing the Texas scheme. After the election Texas was promptly annexed. This led to war with Mexico, a war which resulted in the acquisition by the United States of California and New Mexico, thus affording room for further extension of slave territory.

I. Tyler and the Whigs. Schouler, IV., 367-95, 404-11, 430-3.

a The bank.
b The cabinet.
c The tariff of 1842.
d John Tyler's machine.

II. Whig and Democrat. Schouler, IV., 433-5, 459-61, 465-9.

a The reaction from 1840.
b Plans for '44.
c Nomination of Clay.
d Defeat of Van Buren.

III. Slavery Before 1844. Rhodes, I., ch. i.

a Early days.
b Emancipation in the North.
c Renaissance of slavery in the South.
d The Missouri compromise.
e The abolitionists.
f The right of petition.
g More territory for slavery.

IV. Texas. Von Holst's *Calhoun*, ch. viii.

a The Louisiana treaty — 1803.
b The Florida treaty — 1819-21.
c The American migration.
d The Texan revolution.
e Negotiations.

V. The Election of 1844. Schouler, IV., 471-80.

a The party platforms.
b The Oregon question.
c Clay's Texas letters.
d Defeat of the Whigs.

VI. Texas and Tyler. Schouler, IV., 482-8.

a Negotiations renewed.
b Texas annexed.
c The Mexican view.

VII. Mexico and Polk. Schouler, IV., 495-504, 518-43; V., 1-92.

a The new President and his aims.
b The collision.
c The war of conquest.
d Overthrow of Mexico — treaty of Guadaloupe Hidalgo.

EXERCISES

1. Political motives of the annexation of Texas.
2. How Clay was defeated in 1844.
3. John Quincy Adams and the right of petition.
4. American claims on the Mexican treasury.
5. Calhoun's share in the annexation of Texas.

LECTURE XI

THE LAST COMPROMISE

Goldwin Smith, 312-5; Judson, 390-4; Andrews, II., 30-7; Rhodes, I., ch. i.-iv.

The acquisition of territory from Mexico at once renewed the dispute between slavery and freedom which the Missouri Compromise had settled for the territory bought from France. The war was not popular in the northern states, and at the election of 1848 the Whigs again were successful, choosing General Taylor to the presidency. The discovery of gold in California caused a sudden rush of people there, and they almost immediately formed a state organization without slavery and applied for admission to the Union. There was a sharp contest in Congress, which was settled by the compromise measures of 1850. This was intended to put an end to the slavery agitation. But in fact it put an end to the Whig party. After the election of 1852, that party disappeared from our politics.

I. The Slavery Propaganda.

II. "The Irrepressible Conflict."

III. The Last Whig Victory—1848. Schouler, V., 100-114; McLaughlin's *Cass*, ch. viii.

a The war and the people.
b Free soil.
c "Hunkers" and "Barn Burners."
d Old Rough and Ready.
e The three conventions.
f The election.

IV. THE CONQUERED TERRITORY. Schouler, IV., 543-4, V. 129-47.

a The Wilmot proviso.
b California.
c New Mexico and Utah.
d Pro-slavery demands.
e The administration plan.

V. THE COMPROMISE OF 1850. Schouler, V., 161-73; 178-201; McLaughlin's *Cass*, ch. ix.

a Henry Clay's omnibus scheme — the Whig schism.
b Webster's 7th of March speech.
c Death of the president.
d The compromise carries.

VI. THE FUGITIVE SLAVE LAW. Schouler, V., 199; Greeley, ch. xvi.

a The constitution.
b The law of 1793.
c The free states and the fugitives.
d The law of 1850.
e The underground railroad.

VII. DEATH OF THE WHIG PARTY. Schouler, V., 212, 239-49.

a The compromise and the politicians.
b The compromise and the people.
c The election of 1852.
d Dissolution of the Whig party.

EXERCISES.

1. Provisions of the compromise measures of 1850.
2. Explain the collapse of the Whig party in 1852.
3. The wisdom of the compromise of 1850.
4. The working of the fugitive slave law.
5. Was Seward right in his view of "the irrepressible conflict"?

LECTURE XII

SECESSION

Goldwin Smith, 418-54; Judson, 295-312; Andrews, II., 98-101; Rhodes, ch. v xv.

In 1852 the Whig party fell to pieces, and one of the first acts of the new Democratic administration was the law organizing the territories of Kansas and Nebraska and repealing the Missouri compromise. This opened the Northwest to slavery. There was a desperate struggle between the two sections for the possession of Kansas, but in the end the free settlers prevailed. Meanwhile a new political party had been formed in the North, with the cardinal principle that slavery should not be permitted in the territories. In 1860 this party, owing to a split in the Democratic National Convention, succeeded in electing a president. Then the slave states nearly all seceded from the Union, and formed a confederate government of their own. The Calhoun theory of the nature of the constitution and the continued existence of slavery were both at stake. The result was a civil war of vast proportions, which put an end to the extreme theory of state rights and to the institution of slavery as well. The republic became in fact what since 1789 it had been in form a nation.

1. Renewal of Slavery Extension. Schouler, V., 280-92, 301 ff.

a The compromises.

b The Kansas-Nebraska bill; repeal of the Missouri compromise (1854).
c The Free Soil uprising; the Republican party.
d The "Know-nothings."

II. THE STRUGGLE FOR KANSAS. Schouler, V., 315-46.
a The Missourians.
b The Emigrant Aid Society.
c The "bogus" legislature.
d The Topeka constitution.
e "Bleeding Kansas."

III. THE ELECTION OF 1856. Schouler, V., 349-56.
a The Dred Scott decision (1857).

IV. "MANIFEST DESTINY."
a The Gadsden purchase.
b The filibusters.

V. KANSAS FOR FREEDOM. Schouler, V., 357-9, 361-3, 382-6, 391-400, 424.
a The Lecompton constitution.
b Old John Brown; the Jayhawkers.
c Defeat of pro-slavery.

VI. ELECTION OF 1860. Schouler, V., 427-33, 454-69.

VII. SECESSION. Schouler, V., 469-512.
a The constitutional question.
b Secession a theory.
c Secession a fact.
d Buchanan and the secessionists.
e War.